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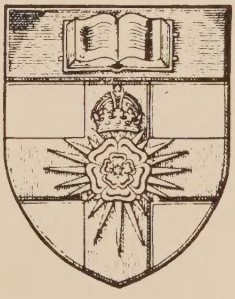

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CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

WILLIAM GREEN,

BARRISTER-AT-LAW.

1911.

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Lord Chancellors.

The Right Hon. Sir Samuel Walker, Bart.

The Right Hon. Redmond J. Barry.

Lords Justices of Appeal.

The Right Hon. Hugh Holmes.

The Right Hon. Richard R. Cherry.

King's Bench Division.

The Right Hon. Lord O'Brien, L.C.J.

The Right Hon. Christopher Palles, C. B.

The Right Hon. John George Gibson.

The Right Hon. D. H. Madden.

The Hon. Walter Boyd.

The Right Hon. William Kenny.

The Hon. George Wright.

The Hon. W. H. Dodd.

Attorneys-General.

The Right Hon. Redmond J. Barry.

The Right Hon. Charles A. O'Connor.

Solicitors-General.

Charles A. O'Connor, K.C.

Ignatius J. O'Brien, K.C.

[These Reports will be cited as follows :—[1911] 2 I. R.]

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King's Bench Division, and Court for Crown Cases Reserved,	JOHN G. THOMPSON, JAMES MOLES, C. NORMAN KOUGH,	Barristers-at-law.
King's Bench Division (Probate),	WILLIAM LAWSON, A. E. CLERY,	Barristers-at-law.
King's Bench Division (Bankruptcy),	R. W. LUCAS, WILLIAM M'GRATH.	Barristers-at-law.

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CORRIGENDA.

Page 1, line 2 of head-note, *after* "not" *delete* "to".

,, 118, ,, 10 ,, ,, *for* "sect. 2" *read* "sect. 62".

,, 123, last line, *for* "sect. 63" *read* "sect. 62".

,, 295, note (2), *for* "5 Bing. 162" *read* "2 Bligh (N.S.), at p. 162".

,, 297, ,, ,, "[1905] 2 Ch. 538" *read* "[1904] 2 Ch., at p. 560".

,, 362, line 3 from foot, and 363, line 17 from top, *for* "Selina" *read* "Sulina".

,, 498, ,, 4, *for* "contended" *read* "conceded".

,, 499, ,, 4 from foot, *for* "right" *read* "sought".

,, 605, ,, 8 ,, *for* "Lamargue" *read* "Lamarque".

,, 631, ,, 9 ,, *for* "570" *read* "510".

NOTE.

The Court of Appeal have affirmed the judgment of the King's Bench Division in THE CAVAN COUNTY COUNCIL AND BAILIEBOROUGH RURAL DISTRICT COUNCIL *v.* KANE, [1910] 2 I. R. 644.

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1911.

IN RE DANIEL KELLEHER, A BANKRUPT (1).

Appeal.
1910.
April 21, 22.

*Voluntary conveyance—Whether fraud on creditors—Existing creditors paid off—Future creditor—*10 *Car.* 1 (*Ir.*) *sess.* 2, *c.* 3.

In the absence of any express intention to defraud, a voluntary deed will not to be set aside at the instance of a creditor whose debt comes into existence after its date, if all creditors existing at the date of the deed have been paid off.

APPEAL by Ellen Kelleher, the dischargeant, from the order of the Hon. the Recorder of Cork, dated the 24th February, 1910, dismissing her appeal against the order of the Registrar, dated 6th April, 1909, declaring fraudulent and void against the assignees of the bankrupt's estate a certain conveyance of the 24th August, 1906, whereby the bankrupt, in consideration of natural love and affection, assigned to his wife, the said Ellen Kelleher, six small

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1910. *In re* KELLEHER.

houses at Carregaminny, county Cork, held by him from Mr. W. H. H. Massy, for thirty-five years, from 1896, at the yearly rent of £8.

Kelleher had been in the employment of Mr. Massy as gamekeeper at 10*s.* a week. He lived in one of the houses, and sub-let the remaining five at rents amounting in all to £16 12*s.* Kelleher unfortunately fell into drinking habits, and used to obtain payment of the rents in advance, spending the amount in drink, and in the month of June, 1906, was arrested and returned for trial for an assault on a man named Timothy Kelleher. At the date of the deed the bankrupt was only indebted to the extent of £37 9*s.* Some of these debts were fully secured; the unsecured creditors were paid the full amount due to them on the 21st June, 1907, before the adjudication in bankruptcy, the money for this purpose being raised by Mrs. Kelleher, on the security of the lease and assignment, and with the assistance of Mr. Massy. At the October Quarter Sessions the bankrupt, who was defended by Mr. G. M'Sweeney, was acquitted of the alleged assault on Timothy Kelleher. No civil action was ever brought by Timothy Kelleher to recover damages for the alleged assault. In the month of November, 1906, a writ of summons for slander at the suit of John Walsh was issued and served upon the bankrupt, the defamatory words being alleged to have been spoken early in that month; and at the Spring Assizes, 1907, Walsh recovered £50 for damages and £24 15*s.* 1*d.* for costs. Daniel Kelleher was adjudicated a bankrupt on Walsh's petition on the 25th June, 1907, on foot of a debtor's summons issued by Walsh, and Walsh was appointed creditors' assignee.

A large body of evidence was given before the Registrar, but the above brief summary is sufficient to indicate the nature of the points of law dealt with by the Court of Appeal. There was no authentic record of the grounds on which the decision under appeal was based, but from a newspaper report it would appear that the Registrar held that the bankrupt executed the deed with the deliberate intent to delay, hinder, and defraud his creditors, and to protect the property from any action by Timothy Kelleher for the assault, and that after he had done so he had no means and no expectation of being able to pay his then existing creditors,

and had reduced himself to a state of insolvency. Mr. Ashe acted as the bankrupt's solicitor in all the proceedings. He was not examined during the proceedings before the Registrar.

A. M. Sullivan, K.C., and *Hon. Cecil Atkinson*, for the appellant:—

In every aspect of the case it is impossible for the Court to say that there is any reason whatever for impeaching this deed. No existing creditor was defrauded, because all the unsecured creditors were paid in cash. At the date of the deed Walsh's cause of action had not even arisen. The only person who lost money was Mr. Massy, who was only too anxious to befriend the Kellehers. The rule of law governing such cases is laid down by Lord Westbury in *Spirett* v. *Willows* (1), to the effect that if a subsequent creditor seeks to set aside a voluntary deed, he must either show that there was express intent "to defeat, hinder, or delay," within the meaning of the statute, or "that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing creditors." The second alternative is out of this case, because the existing creditors were actually paid: *Sims* v. *Thomas* (2); *Ex parte Mercer*; *In re Wise* (3), followed and approved of in *In re Holland*; *Gregg* v. *Holland* (4).

Lord Westbury's rule was adopted by Wright, J., in *In re Lane-Fox*; *Ex parte Gimblett* (5). *Barling* v. *Bishopp* (6) was a case in which the express object of the deed was to defraud future creditors. The Court must decide in each particular case whether there was an intention in the settlor to defeat, hinder, or delay his creditors: *Thompson* v. *Webster* (7), *per* Kindersley, V.-C.

Ronan, K.C., and *M'Sweeney*, for the respondents:—

First, consider the case as if the assault on Kelleher had never taken place; this deed as a matter of law was void, because it hindered existing creditors in recovering the debts due to them. The debts were presently payable, and but for the deed could

(1) 3 De G. J. & S. 293; 34 L. J. (N. S.), Ch. 365.
(2) 12 Ad. & Ell. 536.
(3) 17 Q. B. D. 290.
(4) [1902] 2 Ch. 360.
(5) [1900] 2 K. B. 508.
(6) 29 Beav. 417.
(7) 4 Drew. 628.

Appeal. 1910. *In re* KELLEHER.

have been immediately enforced against the property therein comprised. Secondly, this deed stripped the maker of it of all the property he possessed. The man became an absolute pauper when he executed the deed.

In *In re Moroney* (1), the Lord Chief Baron says, p. 60:—"The expression 'fraudulent conveyance' in sect. 21, sub-sect. 2, of the Bankruptcy (Ireland) Act, 1872, includes two classes of conveyance—one, the class of conveyance fraudulent in fact; secondly, conveyances of such a character that their necessary or probable result was to defeat or delay creditors; and in such cases the inference that they were fraudulent was a conclusion of law, not a matter of fact"; and, at p. 64, the same learned Judge says:—"It remains but to refer to the decisions upon voluntary deeds, made with intent to defraud one creditor only, but the effect of which, as I have already pointed out, must be to prejudice all creditors. The decisions upon these instruments have uniformly been that they are fraudulent within the statute," *i.e.*, 13 Eliz., c. 5, and he refers to four English cases in support of that proposition.

In *Freeman* v. *Pope* (2) James, V.-C., while following *Spirett* v. *Willows* (3), did so with reluctance. In the Court of Appeal the principles laid down by the Lord Chief Baron in *Moroney's Case* (1) were followed. Lord Hatherley says (p. 540)—"It would never be left to a special jury to find *simpliciter* whether the settlor intended to defeat, hinder, or delay his creditors without a direction from the Judge that if the necessary effect of the instrument was to defeat, hinder, or delay his creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor."

The statute of Elizabeth is to be liberally construed, and cannot be too much extended in suppression of fraud: *per* Lord Mansfield, C.J., in *Cadogan* v. *Kennett* (4), cited in May on Fraudulent Conveyances, 3rd ed., p. 4.

(1) 21 L. R. Ir. 27.

(2) L. R. 9 Eq. 206; L. R. 5 Ch. App. 538.

(3) 3 De G. J. & S. 293; 34 L. J. (N. S.) Ch. 365.

(4) 2 Cowp. 434.

In *In re Ridler*; *Ridler* v. *Ridler* (1), where a father had given a guarantee of £1000 to secure his son's overdraft, which at the date of a voluntary settlement amounted to over £1500, and was not otherwise indebted, the Court of Appeal set aside the settlement which covered all the settlor's property except some furniture and a debt of £1000.

"The question whether a voluntary settlement can stand against creditors at its date, does not depend on whether they are willing to forego the immediate payment of their debts, if then due, but on the question whether they are entitled to press for payment, and, if so, whether they can get a present payment without resorting to the property in settlement": May on Fraudulent Conveyances, 3rd ed., p. 33. If a man is indebted, and he executes a deed which makes him a pauper, the deed is void at law. "Where a voluntary conveyance is made by a person 'indebted,' any creditor who became such after the date of its execution (as well as any of the original creditors) can maintain an action to have the settlement set aside under the statute so long as any debt due at the date of the settlement remains unpaid at the time of the commencement of the action": May on Fraudulent Conveyances, p. 40. The learned author says (at p. 42) that the point has never been expressly decided whether the subsequent creditor can maintain an action where all the existing debts have been paid, but expresses the opinion that the subsequent creditor could do so if the settlor was in embarrassed circumstances at the date of the deed, citing *Holmes* v. *Penney* (2) and the observations of Page Wood, V.-C.

In *Smith* v. *Tatton* (3), Baron Fitz Gerald (at p. 42) puts the case of contemplated future indebtedness. He says (p. 43): "I have not found any case, nor was any cited, in which where no debts were existing at the time of the execution of the deed, and the deed was for value, it was successfully impeached by subsequent creditors as wanting *bona fides* under the statute. I will not, however, take on myself to say that there might not be such a case"; and he gives as his reason for supporting the deed in that case that there was no evidence of future indebtedness being in the contemplation of the grantor.

(1) 22 Ch. D. 74. (2) 3 K. & J., at p. 100. (3) 6 L. R. Ir. 32.

Appeal. 1910. *In re* KELLEHER.

"The cases in which voluntary conveyances are void under the statute, or against creditors whose claims exist at the time of the conveyance, may be divided into (1) those in which the fraudulent intent, though not apparent as a fact in evidence in the case, is established as a presumption of law; and (2) those in which such intent appears as a fact in evidence": May on Fraudulent Conveyances, 3rd ed., p. 26. Here the deed is dated the 3rd August. The debtor summons was issued on the 3rd June. To draw inference of the honesty of the deed from the subsequent payments to creditors is absurd. The authorities are clear that if the deed was made to protect property from an anticipated adverse verdict it cannot stand. In *Ex parte Mercer*; *In re Wise* (1), the bankrupt was able to pay his debts without resorting to the settled property, and Lindley and Lopes, L.JJ., carefully guard themselves from concurring in Lord Esher's sweeping propositions. The true rule is stated in *Mackay* v. *Douglas* (2) by Malins, V.-C., a case followed and approved of by the Court of Appeal in *Ex parte Russell*; *In re Butterworth* (3), where Lindley, L.J., describes it as one of the most valuable decisions on the statute of Elizabeth. That was a case of subsequent creditors.

THE LORD CHANCELLOR:—

This case has been so fully argued that we do not require to hear counsel for the appellant in reply. We are all of opinion that the order of the Recorder of Cork must be discharged, and the application of the assignees refused.

The facts are few and admitted. The bankrupt had a small leasehold property from which he derived a profit rent of about £16 a year. He lived in one of the houses comprised in the lease, and drank heavily. He was in the habit of getting the rents of the other houses in advance. On the evidence of the bankrupt and his wife (which if untrue might have been contradicted by Mr. Ashe), the bankrupt anticipated all the September rents, and his wife could get nothing under the impeached deed, until March, 1907. She swears that her motive was to save her husband from himself, to prevent his collecting the rents in

(1) 17 Q. B. D. 290. (2) L. R. 14 Eq. 106. (3) 19 Ch. D. 588.

advance and spending them in drink, and to save the property for their children. The deed was executed on the 24th August, 1906, at a time when this imaginary action of Tim Kelleher was not even in the air. Nobody ever thought of it. Such an action could only have been brought on the hypothesis that the acquittal secured in October, 1906, by Mr. M'Sweeney's eloquence, could not take place.

This is not like *Mercer's Case* (1), where the writ was issued and served before the voluntary deed was executed. This was an absolutely imaginary action. To suggest that it could have been in the minds of the bankrupt and his wife to defeat such an action is absurd. They never dreamed of any intended action by Tim Kelleher.

The only debts the bankrupt owed at the date of the deed amounted to £37 9*s*. Part of this was secured by the deposit of the lease and is not to be taken into account: May on Fraudulent Conveyances, 2nd ed., p. 57. No express intent to defraud was proved. I admit that it is the law that if there be existing creditors whose debts are due, and a voluntary conveyance is made by the debtor which does not leave him the means of paying them, the law will presume an intent to defeat and delay them according to the dictum of Baron Fitz Gerald in *Smith* v. *Tatton* (2). But we have not to deal with these creditors at all, but with Walsh, whose debt did not come into existence until the March Assizes, 1907. The other small unsecured debts were actually paid off on the 21st June, 1907, four days before the adjudication in bankruptcy, the date of which was the 25th June in that year. I dare say Mrs. Kelleher had the debtor's summons in view, and was anxious to have her husband free from debt. I dare say she did not think Walsh, the plaintiff in the slander action, a very meritorious person. The learned Recorder, and his Registrar, Mr. Wright, had in their minds that there was an intention to defraud Tim Kelleher (the man who was alleged to have been assaulted). There is no foundation whatever for that in fact. Mr. Ronan did not rely on that ground—we may say that he threw it overboard. Mr. Ronan raised the question

(1) 17 Q. B. D. 290. (2) 6 L. R. Ir. 32, at p. 41.

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that as debts were in existence on the 24th of August, 1906, when the deed was executed, the existence of these debts, whether they were afterwards paid off or not, would have this effect that if any new creditor afterwards sprung into existence, he could say: "The deed is void—not against A. and B., who were creditors at the date of the deed—but as against myself." It seems to me strange if that be the law. *Jenkyn* v. *Vaughan* (1) and *In re Holland*; *Gregg* v. *Holland* (2) are against it; and the passage in May, 2nd ed., 520 (3), is clearly against it: "The point has never been expressly decided whether, if all the debts due at the date of the settlement are paid off before the writ in the action is issued, a subsequent creditor can maintain that action to set aside the settlement, simply on the ground that the settlement was voluntary, and that the settlor was then indebted. It is conceived that in the absence of any fraudulent contrivance on the part of the settlor to pay off the existing creditors by creating fresh ones, such action could not be maintained, because the equity of the subsequent creditor cannot be a higher one than that of a creditor at the date of the settlement." Whether there was contrivance on the part of the settlor is the point. I think there would be a great difference if it was proved that there was an actual intention to defeat and delay creditors. The dicta in May would be well worth considering. But that does not arise here, because no actual intent to defraud has been proved. In *Moroney's Case* (4) in this Court, and in *Smith* v. *Tatton* (5) in the Exchequer Division, this was held to be the material question. In the latter case, Baron Fitz Gerald says (p. 42), "Any absolute conveyance of property, if valid, defeats all creditors as to such property, whether present or future; but the subsequent creditor in the case supposed succeeds, not on the fact of his being defeated, but by reason of the fraudulent intent as to the existing creditors. The other class of cases is where, either by the provision of the deed or other circumstances, it is shown that future indebtedness was at least in the contemplation of the grantor, so as to point whatever other evidence there may be of fraud to future creditors."

(1) 3 Drew. 419, see p. 425.
(2) [1902] 2 Ch. 360.
(3) 3rd ed., p. 42.
(4) 21 L. R. Ir. 27.
(5) 6 L. R. Ir. 32.

That shows the view Baron Fitz Gerald would have taken of Walsh's debt.

We cannot come to the conclusion that we can rely on anything that occurred as a ground for setting aside the deed.

HOLMES, L.J.:—

The charge in bankruptcy in this case was filed for the purpose of setting aside a conveyance of six small houses to the bankrupt's wife, on the ground that it was a fraud on creditors within the statute of Charles I., and the case was presented in two ways. It has been alleged that at the time the deed was executed the actual intention of the bankrupt was to defeat his creditors, and if I could draw this inference from the evidence, my judgment on this appeal would be different from what it is; but I am satisfied that the deed was not executed with any such intention.

The case, then, depends upon a different proposition of law, viz., that though there be no express intent, yet if the result be to deprive the debtor of all property with which to pay existing creditors, the Court must infer an intent to defeat, hinder, or delay them, and that therefore the deed was liable to be successfully impeached. I agree in this proposition up to a certain point. If any of the creditors at the date of the deed, the total of whose debts was £37 odd, had come forward to set the deed aside on the ground that they were thereby deprived of the means of realizing their debts, I am of opinion that, according to the authorities, they could have done so successfully. But none of them did so. Subsequently all of them were paid; and at the time of the adjudication of bankruptcy nothing was due to them. The only sum then due was a debt that arose months after the execution of the deed, and we are asked by this creditor to imply a fraud which had no actual existence. There is no authority for such a contention, and I am not prepared to extend the Act of Charles I. without authority. Mr. May thinks that no such authority exists. I am of opinion that once the creditors' debts that existed at the date of the deed were discharged, this later creditor cannot take advantage of what might have been relied on by the previous creditors as an implied fraud on them.

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CHERRY, L.J. :—

Mr. Ronan has abandoned the grounds on which the Registrar and the Recorder held the deed to be void, namely, that it was an attempt by the bankrupt to defeat Tim Kelleher. I cannot see how such a person can be considered a creditor. That ground was wisely abandoned by counsel. They rest this case now on a presumption of fraud, which they say arises where a person executes a deed, denuding himself of all his property, if at the time he owes any debt, no matter how small. If that be so, a valid voluntary assignment of all his property could scarcely ever be made by any man, however honest, for almost everyone owes small sums to traders and others in the ordinary course of business. I can find no authority for the proposition in the very broad terms it is laid down. Mr. Ronan relied on the Chief Baron's judgment in *Moroney's Case* (1). But no such question arose there, because the intention to defeat the landlord's claim for rent was admitted. I agree with the other members of the Court that the appeal must be allowed; unless an intention to defraud some creditor, as a matter of fact, can be established, I do not see why a deed should be set aside or declared void.

Solicitors for the appellant: *Wynne and Wynne.*
Solicitor for the respondents: *Dunlea.*

W. G.

(1) 21 L. R. Ir. 27.

THE KING (WILTON VAUGH AND JOHN HOSIE) *v.* RIGHT HON. FREDERICK S. WRENCH, RIGHT HON. MICHAEL FINUCANE, AND RIGHT HON. WILLIAM F. BAILEY, ESTATES COMMISSIONERS (1).

K. B. Div. 1910. Jan. 26, 27. June 14.

Landlord and Tenant—Land Purchase—Irish Land Act, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98—*Estates Commissioners—Lands fit to be regarded as a separate estate—Judicial determination—Duty of Estates Commissioners —Natural justice—Hearing owner—Mandamus.*

The determination of the Estates Commissioners whether lands, in respect of which an originating application for sale has been lodged with the Irish Land Commission, are or are not fit to be regarded as an "estate" for the purposes of the Irish Land Act of 1903 (3 Edw. 7, c. 37), is a judicial determination.

Where the Estates Commissioners, without affording the owner the opportunity of a hearing, dismissed an originating application, endorsing thereon an order that the lands therein were not fit to be regarded as an estate for the purposes of the Irish Land Act of 1903:

Held, by Madden, J., and Wright, J. (Lord O'Brien, L.C.J., dissenting), that the order of the Estates Commissioners was invalid, the refusal to hear the owner not being in accordance with the principles of natural justice, and that a mandamus should issue directing the Estates Commissioners to afford a hearing to the owner.

Semble, per Madden, J. When the refusal to declare lands an "estate" is founded on a conclusion of law, the Estates Commissioners are under a statutory obligation to state the grounds of their refusal, so that the interested parties may have an opportunity of exercising their right to have a question of law referred to the Judicial Commissioner under sect. 23 of the Irish Land Act, 1903 (3 Edw. 7, c. 37).

MOTION on behalf of the prosecutors to make absolute a conditional order that a writ of *certiorari* should issue, directed to the Estates Commissioners to bring up and quash an order made by them on the 26th November, 1908, refusing to declare certain lands, in respect of which the prosecutors had, as vendors, lodged

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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an originating application for the sale thereof under the Irish Land Act, 1903, fit to be regarded as an estate for the purposes of the said Act; and that a writ of mandamus should issue directed to the Estates Commissioners, commanding them to proceed under the provisions of the said Act—(1) To declare that the said lands were fit to be regarded as a separate estate for the purposes of the said Act, or, in the alternative, that such portions of the said lands as were in the occupation of tenants, for the purchase of whose holdings the advances applied for were within the limits prescribed by section 1, sub-section 1, of the said Act, were fit to be regarded as a separate estate for the purposes of the said Act. (2) In the alternative, to hear and determine according to the law whether the said lands were fit to be regarded as a separate estate for the purposes of the said Act; and to state the reasons for their determination.

In 1908, the prosecutors, Wilton Vaugh and John Hosie, who were trustees for sale of the estate of Sarah Acheson, deceased, under her will, lodged an originating application, Record No. E.C. 6073, for the sale of the said lands, the particulars and description of which, so far as the same were in evidence before the King's Bench Division, are given *infra*, pp. 13, 14, under the provisions of the Irish Land Act, 1903.

On the 26th November, 1908, the Estates Commissioners endorsed the following order on the said originating application:—"The Estates Commissioners refuse to declare that the lands set out in first schedule within are fit to be regarded as an estate for the purposes of the Irish Land Act, 1903."

This decision was communicated to the vendors' solicitors on the 10th March, 1909, by Mr. John T. Drennan, Registrar and Assistant Secretary to the Estates Commissioners, in the following letter:—

"With reference to the originating application lodged for the sale of the lands therein comprised under the Irish Land Act, 1903, I am directed by the Estates Commissioners to state that they are unable to see their way to declare the lands fit to be regarded as an estate for the purposes of the Irish Land Act, 1903; and have accordingly refused so to declare them.

"The purchase agreements, maps, schedules, &c., are returned herewith."

On the 12th March, 1909, the vendors' solicitors replied by letter requesting that, as the vendors had received no communication from the Estates Commissioners since the lodgment of the agreements for purchase, the vendors and tenants might be informed of the reasons of the Estates Commissioners' decision.

The following reply to this letter was sent by Mr. Drennan on the 13th July, 1909, to the vendors' solicitors:—

"I am directed by the Estates Commissioners to inform you that they regret that they cannot see their way to depart from their decision not to declare as fit to be regarded as an estate for the purposes of sale under the Irish Land Act, 1903, this property, the greater portion of which is situate in the Congested Districts of Leitrim.

"It is not the practice of the Commissioners to state the reasons which actuate them in the exercise of the discretion vested in them; but I am to add that their ruling does not in any way prevent the owners from offering to sell the portion situate in the congested districts of Leitrim to the Congested Districts Board, nor does it interfere in any way with the vendors' powers to sell the holdings under the Land Purchase Acts otherwise than as 'an estate' under Part I of the Irish Land Act, 1903."

The condition of the lands in question, and the proceedings in relation to the attempted sale thereof, were thus described in an affidavit, sworn by Mr. Wilton Vaugh, upon which the motion for the conditional order was grounded:—

"The said estate comprises in all 814A. 1R. and 25P., statute measure, of which 14A. 2R. and 12P. are situate in the Barony of Skreen, county Meath, all in the occupation of a tenant at the yearly non-judicial rent of £16 13*s.*; and the remainder of the estate is situate in the Barony of Dromahaire, county Leitrim, and is in the occupation of sixty-three tenants, of whom fifty-eight are judicial tenants, four are tenants of ordinary agricultural holdings at yearly non-judicial rents, and one is tenant of a residential holding, containing 2A. 1R. and 6P., held under a lease

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for 100 years from the 1st January, 1861, at the yearly rent of £5.

"All the tenants on the said estate, except the lessee of the non-agricultural holding, signed agreements in the prescribed form for the purchase of their respective holdings under the Land Purchase Acts; and all the said agreements were duly lodged with the Estates Commissioners between the months of March and June, 1908. All the requirements of the Estates Commissioners as to maps, schedules, and affidavits were duly complied with; and all necessary documents were lodged with them.

"The Land Commission from the date of lodgment of the said agreements collected from the tenants the interest payable by them on their respective purchase-moneys in lieu of rent, as provided by their purchase agreements; and paid the same, as so collected, to me and my co-trustee.

"The prices agreed upon with the judicial tenants were all within the 'zones,' as defined by section 1, sub-section 1, of the Irish Land Act, 1903; and the prices agreed to be paid by the five non-judicial tenants averaged somewhat less than nineteen years' purchase of the rents; prices for which the said respective holdings are, in my opinion, ample security, as the tenants' interest would, in itself, sell for a greater amount.

"From the date of the lodgment of the said agreements and the other prescribed documents with the Estates Commissioners until the receipt of their letter of the 10th March, 1909, no communication of any sort was made by them to me or my co-trustee, nor, as I am informed and believe, to our solicitors; and no reason has ever been given by the Commissioners, or by anyone authorized by them, for their refusal to declare the said lands an estate within the meaning of the said Act; and, speaking for myself and my co-trustee, I say that neither of us is aware of any reason why the said lands should not be declared an estate, and we verily believe that no valid reason for such refusal exists.

"I say that the Estates Commissioners have not had the lands inspected.

"We do not, as such trustees as aforesaid, own any other lands save those above mentioned; and there are no untenanted lands on the said estate."

The deponent referred to the foregoing correspondence, *supra*, pp. 12, 13.

The conditional order was granted on the 29th July, 1909. The grounds upon which this order was granted as to the *certiorari* were thus stated :—

"(*a*) That the order of the Estates Commissioners, dated the 26th November, 1908, was made without jurisdiction and in excess of jurisdiction.

"(*b*) That the said order is bad on its face, inasmuch as the said order does not show the jurisdiction under which the said Commissioners purported to make such order, and does not show that the said Commissioners, in making the said order, were acting within the jurisdiction vested in them.

"(*c*) That the said order was made without giving the parties interested an opportunity of being heard, and without the said Commissioners having before them for consideration the proper and necessary information for enabling them to come to a proper determination in the premises.

"(*d*) That the said Commissioners acted without jurisdiction, and in excess of jurisdiction, in refusing to declare the said lands to be an estate, because they were situate wholly or in part within a congested district.

"(*e*) That the said Commissioners, in pursuance of the Irish Land Act, 1903, should have declared by the said order that the said lands are fit to be regarded as a separate estate for the purposes of the said Act; or, in the alternative, that the portion of the said lands in the occupation of the tenants for the purchase of whose holdings the advances applied for are within the limits prescribed by section 1, sub-section 1, of the said Act, should, by the said order, have been declared fit to be regarded as a separate estate for the purposes of the said Act."

The following affidavit to show cause why the conditional order should not be made absolute, was sworn by Mr. Drennan and filed on behalf of the Estates Commissioners :—

"After the filing of the originating application with reference to the lands mentioned in the affidavit of Wilton Vaugh, the Estates Commissioners investigated the case and caused such

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inquiries to be made and information to be obtained as they considered to be material for their guidance in the exercise of their discretion as to declaring the said lands fit to be regarded as a separate estate under the Irish Land Act, 1903. Having fully considered the entire matter, they were of opinion that the said lands were not fit to be regarded as a separate estate for the purposes of the said Act, and by their ruling or order endorsed on the said originating application, refused to declare that the said lands were fit so to be regarded.

"The Commissioners submit that the granting or refusing the declaration sought by the said originating application was a matter entirely within their discretion; and that in making the said ruling or order they acted in strict accordance with the provisions of the Land Purchase Acts; and that the conditional order herein should be discharged with costs."

This affidavit, the foregoing affidavit of Wilton Vaugh, and the correspondence therein referred to, were the only evidence before the Court upon the hearing of the motion.

The Right Hon. J. H. Campbell, K.C., Powell, K.C., and *Leech*, for the prosecutor.

Ronan, K.C., A. C. Meredith, K.C., and *De Renzy*, for the respondents.

[The arguments of counsel appear sufficiently from the judgments. The following cases were cited in argument:—*Weir's Estate* (1); *Clanricarde's Estate* (2); *Scottish Union and National Insurance Company's Estate* (3); *Talbot Crosbie's Estate* (4); *Hind's Estate* (5); *R.* (*Lady Mowbray and Stourton*) v. *Local Government Board* (6); *Cooper* v. *Wandsworth District Board* (7); *Smith* v. *Regina* (8).

The following statutes were referred to—Irish Land Act, 1903 (3 Edw. 7, c. 37), ss. 1 (1) 23, 98; Evicted Tenants Act, 1907 (7 Edw. 7, c. 56), s. 2 (4).]

(1) [1908] 1 I. R. 161.
(2) [1908] 1 I. R. 423.
(3) [1906] 1 I. R. 42.
(4) [1905] 1 I. R. 570.
(5) 43 I. L. T. R. 75.
(6) 43 I. L. T. R. 76; and Bolton's Labourers Acts, vol. ii, addenda, p. xxix.
(7) 14 C. B. (N. S.) 180.
(8) 3 App. Cas. 614.

WRIGHT, J.:—

The main object of the originating application in the present case is to obtain from the Estates Commissioners a declaration that the lands comprised in it are fit to be regarded as a separate estate for the purpose of the intended sale or sales from the owners to the tenants of their several holdings. The determination of this matter is, in the language of Fitz Gibbon, L.J., a condition precedent to putting into execution the provisions of the Act for the purpose of carrying out a sale of any lands, and is "a judicial declaration and determination": *Weir's Estate* (1). To the like effect is the language of the Lord Chancellor at p. 176, where he says that, in declaring lands, the subject of an originating application, fit to be regarded as a separate estate for the purposes of the Act, the Estates Commissioners are exercising "their judicial discretion": and the language and reasoning of Holmes, L.J., at p. 188, are to the same effect; and I may also refer shortly to the judgment of Mr. Justice Meredith in the case of *The Scottish Union Insurance Company's Estate* (2), where he says (p. 46):—"The fact is sometimes overlooked that the Estates Commissioners are Land Commissioners, and exercise all the powers and duties of the Land Commission, under sections 1 to 23 of the Land Act of 1903; and, of course, duties of a judicial and semi-judicial character are exercised by the Land Commission." It was hardly denied in the argument before us that the Estates Commissioners, in deciding on an originating application like the present, are determining the matter judicially; but it was contended that they are not a Court, and are not bound to hear the parties or give reasons for their decision, which, they say, is the result of inquiries made by them, and information obtained; and they adopt the language of the members of the Court of Appeal in *Weir's Estate* (1). To quote from the affidavit of their Assistant Secretary, Mr. Drennan:—"The Estates Commissioners investigated the case, and caused such inquiries to be made and information to be obtained as they considered material for their guidance in the exercise of their discretion as to declaring the lands fit to be regarded as a separate

(1) [1908] 1 I. R., at p. 178. (2) [1906] 1 I. R. 42.

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estate." This paragraph does not give the Court, or the aggrieved party, any information; it expressly withholds and plainly asserts its right to withhold information. It is taken almost verbatim from passages in the judgment of the Lord Chancellor at p. 176 of *Weir's Estate* (1), of FitzGibbon, L.J., at p. 179, and of Holmes, L.J., at p. 188, and it is obvious that this official, Mr. Drennan, was made to swear to the very identical words used in the judgment, so as to secure for the Estates Commissioners the protection of the decision in that case.

It is well to point out that the essential matters decided in *Weir's Estate* (1) were, first and most important, that in the case of judicial tenants who have agreed to purchase at prices within the zones, the Estates Commissioners have no jurisdiction to consider and inquire whether the holdings were adequate security for the advances applied for; and secondly, the Court condemned as illegal the practice which had been devised by the Estates Commissioners of making what were called Provisional Declarations, purporting to be made under section 98 (1) of the Act of 1903. In the course of their judgments the several members of the Court, while pointing out that the Commissioners were precluded from going into the question of the sufficiency of the security of the holdings for the amount of the advances in cases within (*a*) and (*b*) of section 1 (1) of the Act of 1903, added that they are not precluded from making any inquiries and obtaining any information they may think fit for the purpose of assisting them in determining the important matter which they have to decide under section 98 (1).

These *dicta* of the several members of the Court of Appeal have been pressed to a length to which they were never intended to go, as justifying the Estates Commissioners in deciding without a hearing, in the proper sense of the word, to refuse to an applicant, *prima facie* entitled to it, the relief sought; and on information, not evidence, and information, the nature of which is not disclosed to the party against whom it is used.

The determination of the question whether lands are fit to be regarded as a separate estate under section 98 (1) is one of vital importance to the applicant.

(1) [1908] 1 I. R. 161.

The application is, in effect, an application by landlord and tenants for a sale assisted by State money in accordance with the policy of the Act of 1903, and to replace the former landlord by several, in this case, if the sale went through, by sixty-three, tenant proprietors. The very lodgment of the originating application has important consequences. From that date rent is no longer payable, payment of interest on the purchase-money takes its place, and the status of landlord and tenant is suspended. It is gone for ever if the sale goes through; if it becomes abortive, that status revives, and the tenant becomes liable for the full rent from the former date, being credited with the amount that he has paid as interest in lieu of rent (under section 35 of the Land Act of 1896). From every point of view a matter of more vital consequence to landlord and tenant than a decision whether the lands comprised in an originating application are fit to be regarded as a separate estate it is impossible to conceive. The jurisdiction to decide this and other questions under the Act is conferred on the Estates Commissioners by section 23; and their decision is final and not liable to appeal, subject to this, that they may refer a question of law for the decision of a Judicial Commissioner. There is no analogy between a proceeding like the present and the ordinary case of litigation between parties; neither can it be likened to the case, suggested during the argument, of a petition for sale filed in the Land Judge's Court, and the refusal of the Judge to make a conditional order, from which the party aggrieved can appeal.

Is there to be no hearing? or is the hearing, as was suggested during the argument by counsel for the Estates Commissioners, to consist in the lodgment of the petition, vouched by maps, surveys, affidavit of surveyor and valuation, and the ruling of the Commissioners expressed in a couple of lines:—"The Estates Commissioners refuse to declare that the lands, &c., are fit to be regarded as an estate for the purpose of the Irish Land Act, 1903." It is contrary to the first and most elementary principle of justice that a suitor or suitors—I do not separate, I group together, as suitors, landlord and tenants—should go away, having been denied State aid, and in absolute ignorance of the grounds upon which relief was refused to them. I refer shortly

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to *Smith* v. *The Queen* (1), in the language used in delivering the judgment of the Privy Council, at p. 623—Has the inquiry here been conducted according to the requirements of natural justice? The grounds upon which the Commissioners based their decision adverse to the application may have been capable of being explained away to their satisfaction; they may have been wrong in fact, and capable of being rebutted by evidence, or they may have been erroneous in principle, *e.g.*, the ground of the decision may have been that the greater portion of the estate is situate in the congested districts of Leitrim (see letter of Mr. Drennan, their Assistant Secretary, dated 13th July, 1909), or, as was suggested by their counsel in argument, that the holdings are small, and the Commissioners do not favour the creation of a number of small peasant proprietors. These and other objections are, in my opinion, matters upon which the applicant is entitled to be heard; he is entitled to a hearing in the sense in which that word is used and generally understood, and he is all the more entitled to a hearing before a tribunal whose decision is practically final and not open to review.

The Estates Commissioners are a great administrative body, with power to deal with vast funds. As was pointed out during the argument, the system of land-purchase in Ireland by the tenants with money advanced by the State was initiated by the Land Act of 1870, under which the advance was made by the Board of Works, and the Estates Commissioners under the Land Purchase Act of 1903 may be said to be the successors of the Board of Works. But they are more than an administrative body; they fill, in addition, another capacity, that of determining judicially questions arising under the Act.

I have come to the conclusion that the determination of the question by the Estates Commissioners under section 98 (1) was a judicial determination; that the applicant was entitled to a hearing; that there was no hearing; and that the order made in the absence of a hearing is illegal and ought to be quashed.

(1) 3 App. Cas., pp. 623, 624.

MADDEN, J. :—

The decision of this case mainly depends upon a consideration of the character and consequences of the declaration which the Estates Commissioners are empowered to make under section 98, sub-section 1, of the Irish Land Act, 1903. Any lands in respect of which such a declaration has been made are thereby constituted an "estate" for the purposes of the first part of the Act, which is conversant with the "purchase and re-sale of estates."

The Land Law (Ir.) Act of 1881, section 57, defined "an estate" as meaning "any lands which the Land Commission may, by order, declare fit to be purchased as a separate estate for the purposes of this Act." The purposes of the Act of 1903 are more extensive than those of the Act of 1881, inasmuch as they include the purchase by the Land Commission of an estate from the owner as a whole (sections 6 and 7). The first part of the statute of 1903 introduced into the Land Purchase Code certain novel principles, and attached to the declaration with which the present case is conversant important consequences, in which the owner is vitally interested, and which did not follow from a declaration of an "estate" made under the Act of 1881.

The decision of the Court of Appeal in *In re Weir's Estate* (1), in which the previous cases are reviewed, has rendered it possible to define, within certain limits, at all events, the jurisdiction vested in the Estates Commissioners, and the conditions under which it should be exercised. I confine my observations to a case like the present, where the lands which the owners desire to be declared an estate are let to occupying tenants. Under the Irish Land Act of 1904, land wholly untenanted may be regarded as an estate for the purposes of the bonus, and untenanted land may be purchased under the Act of 1903, section 8. But the provisions of this Act, with which the present case is conversant, relate to the sale of lands in the hands of occupying tenants.

When the owner of the property so circumstanced desires to have it declared an "estate," the proceedings are commenced by an originating application in the form prescribed by the Rules of the Estates Commissioners, dated 23rd October, 1903. The form

(1) [1908] 1 I. R. 161.

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so prescribed has been carefully framed with a view of affording information as to the several matters by which the Commissioners would be influenced, in determining whether the lands are proper to be declared an "estate." It prescribes statements as to the applicant's title, for the purpose of showing that he ought to be regarded as an owner under the provisions of the Act. The physical conditions of the lands, and of any neighbouring lands of which the applicant may be the owner, are to be shown upon a map. Information is required as to demesne lands proposed to be repurchased, as to the tenure of the lands, and as to the claims of any persons who may be interested in the estate. As regards lands in the occupation of tenants, a schedule of tenancies is prescribed, containing information as to the rent, the contract of tenancy, arrears of rent, and whether the tenancy was created since 1st January, 1901.

It is evident that such an application introduces the Commissioners to a very wide field of inquiry. In *In re Weir's Estate* (1) the Lord Chancellor said (at p. 176) that he did not think it possible "to lay down any hard and fast rule as to what inquiries may be made or information demanded by them before they exercise their judicial discretion in declaring lands the subject of an originating application fit to be regarded as a separate estate for the purposes of the Act." At p. 178, Fitz Gibbon, L.J., said :— "In order to determine whether they are to make the judicial declaration that the lands are fit to be regarded as a separate estate, it is within the power and it is the duty of the Estates Commissioners to make every inquiry and to obtain all information which can be reasonably considered material; and I disclaim any intention to put any limitation upon such inquiry or information *a priori*, by saying that anything must necessarily be irrelevant in all cases."

I shall confine my observations to one of the many inquiries which can be instituted by the Commissioners as the foundation of their judicial action, and I do so because the duty of entering upon this inquiry and the scope of the inquiry have been defined by the decisions of the Court of Appeal.

(1) [1908] 1 I. R. 161.

In the case before us, the originating application was followed by the lodgment of agreements for sale under the Act, signed by sixty-three tenants. Of these, fifty-eight came within the zones, as defined by the first section of the Act. If the lands comprised in the originating application had been declared an "estate," the Land Commission, in carrying out the sale, would have been bound to advance to tenants coming within the zones the amount of the purchase-money agreed upon; and an inquiry into the adequacy of the security by the Estates Commissioners before declaring the lands fit to be regarded as a separate estate would be inconsistent with the discharge of their statutory duty. But an inquiry of another kind in relation to the schedule of tenancies would be not only open to them, but incumbent on them in the discharge of their duties. "The scope of the inquiry," according to Fitz Gibbon, L.J., "includes the title and tenure of the lands, as well as their character, situation, and physical quality, and it includes also the relation between the parties interested as purchasing tenants and a selling landlord": *In re Weir's Estate* (1). In *In re Talbot Crosbie's Estate* (2), Palles, C.B., describes as a "cardinal matter" that the transactions within the Act of 1903 should be real transactions. Fitz Gibbon, L.J., adopts these words in *In re Weir's Estate* (1) at p. 179, and added, "I repeat what I said in *Dayrolles Crosbie's Estate* (3), that the most important matter upon which the Estates Commissioners are not only at liberty, but bound, to satisfy themselves is, that the sale of the holding (being a real holding on the terms alleged) is honestly made and carried out for the agreed price, and that there is no fraud or concealment."

I have referred to the schedule of tenancies to the originating notice prescribed by the Rules of October, 1903. It is upon the statement in this schedule that the Commissioners will form their judgment in relation to any holding, as to its being a real "holding," the sale of which is "honestly made and carried out for the agreed price." One of the statements required in this schedule is whether the tenancy was created since the 1st January, 1901. I do not know on what grounds the Commissioners have acted in

(1) [1908] 1 I. R., at p. 179. (2) [1905] 1 I. R., at p. 577.
(3) [1907] 1 I. R. 134.

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the present case, in the exercise of the absolute discretion which they claim. In their order endorsed on the originating application they simply "refuse to declare that the lands set out in the first schedule within are fit to be regarded as an estate for the purposes of the Irish Land Act, 1903." In the affidavit filed on their behalf by their Registrar, it is stated that the Estates Commissioners "investigated the case and caused such inquiries to be made and information to be obtained as they considered material for their guidance in the exercise of their discretion," and they claim that the making or refusing of a declaration as the result of such inquiries is a matter entirely within their discretion. Suppose that, as the result of their inquiries and of information supplied to them by some party opposing the sale, they had come to the conclusion that the statements in the schedule of tenancies as to the date of the creation of the tenancies were false, and that, so far from being created before 1901, they were bogus tenancies brought into existence immediately before the originating notice, evidently for the purpose of a fraudulent application. Whether or not this particular state of facts occurred in the present case is immaterial for the purpose of testing the position taken up by the Commissioners. They claim a right to investigate the facts of each case which are material for the purpose of their decision, and to arrive at a conclusion adverse to the applicant without affording him an opportunity of showing, if it should be in his power to do so, that the information upon which they proposed to act was unfounded in fact. I have selected the case of a refusal by the Commissioners founded on the character of the alleged tenancy as illustrative of the principles involved in this case for two reasons. First, because of its importance: for it goes to the very root of the exercise of the jurisdiction vested in the Commissioners; and, secondly, on account of the nature of the inquiry, for I can conceive no allegation in regard to which the party concerned has a deeper interest in being heard, or a clearer right to a hearing, than an accusation of being party to a fraud upon an Act of Parliament.

But the refusal of the Commissioners to declare an estate may be founded on a conclusion of law, and, as they refuse to state the grounds of their decision, it is impossible for the applicant in any particular case to know to which category the action

of the Commissioners is to be attributed. In my opinion, the Estates Commissioners are under a statutory obligation, when their refusal to declare lands an estate is founded on a conclusion of law, to afford the parties an opportunity of asserting the right conferred on them by statute, and this obligation is quite independent of the arguments which have been addressed to us founded upon considerations of natural justice. By section 23 of the Act of 1903 the Estates Commissioners are bound, on the application of any person interested, to refer any question of law to the Judicial Commissioners, unless it is certified to be frivolous. The rights conferred by this section would be illusory unless an applicant were afforded some means of knowing whether he was in a position to insist on them.

For aught I know, the refusal of the Commissioners in the present case was founded, not upon the general merits of the application, but upon some definite ground giving rise to legal considerations upon the interpretation of the Land Purchase Acts. Counsel for the Commissioners were asked in the course of the argument to suggest any reasons upon which the refusal in the present case might have been founded. Two distinct considerations were suggested, each of which was challenged as involving a violation of the provisions of the statute. Suppose the Commissioners had in fact acted on one of these—the small size of the holdings on the estate—there would have been undoubtedly a miscarriage of justice in this case; for a refusal based on this ground would certainly give rise to a serious legal question which the applicant had a right to have referred to the decision of the Judicial Commissioner, from the exercise of which right he would have been precluded by the order of the Commissioners.

So long as an applicant is kept in the dark as to the grounds of an adverse decision, he is without the means of obtaining a judicial decision upon any question of law which may be involved. For this reason, if it stood by itself, I should have been of opinion that the order before us, made without affording the applicant the information to which he was entitled, was not a sufficient compliance with the provisions of the statute, and was therefore invalid.

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But there are questions of more general application involved in this case. I was prepared to state the reasons which have led me to the conclusion that the decision of the Commissioners had all the essential elements of a judicial determination affecting proprietary rights, and that this proposition had been expressly recognized by the Court of Appeal. But this part of the case has been so fully dealt with by my brother Wright, that I content myself with saying that I entirely concur with what he has said. I proceed to consider the consequences of the decision at which we have arrived.

It is a fundamental principle, not only of our law, but of the jurisprudence of every civilized community, that no man should be injuriously affected in person or property without being afforded an opportunity of being heard in his defence. This principle has been laid down and applied by Judges of the highest authority, notably by Lord Campbell, C.J., in *Reg.* v. *The Archbishop of Canterbury* (1), and by Holmes, L.J., in *R.* (*Lady Mowbray and Stourton*) v. *The Local Government Board of Ireland* (2). That the decision of the Commissioners excluding the applicant from the benefit of the Act of 1903 is one by which he is prejudicially affected in regard to his property could not be denied. But it was contended on behalf of the Estates Commissioners that the maxim "*audi alteram partem*" does not apply, at all events to the full extent, unless a decision has to be given between two parties with opposing interests. I cannot accept this proposition. The substance of the maxim is, that an adverse judicial decision shall not be given against anyone without allowing him an opportunity of being heard in his defence. The English equivalent of the maxim is thus correctly stated in Broom's Legal Maxims, "No man shall be condemned unheard." That this is the true meaning of the maxim appears clearly not only on principle, but from authority; for the statement of the law contained in the judgment of the Privy Council, delivered by Sir Robert Collier in *Smith* v. *Reg.* (3), is plainly applicable to a unilateral hearing, such as the investigation conducted by the Estates Commissioners in the present case.

(1) 1 E. & E. 559. (2) 43 I. L. T. R. 76. (3) 3 App. Cas. 614.

In applying this maxim to any particular kind of judicial determination, the character of the tribunal and the nature of the duties imposed on it must always be borne in mind. It is not necessary for the purposes of natural justice that the hearing should be in accordance with a formulated procedure, or that the rules of evidence laid down by Courts of Justice should be observed. But the hearing, by which I understand the consideration of the case made by the applicant, should be a real one. This condition is not complied with unless the applicant is somehow made aware of the case that he has to meet, and afforded a reasonable opportunity of meeting it. I have adverted to two classes of questions that may arise under the statute which we are considering. The applicant may be called upon to meet some legal difficulty in regard to the decision of which he has certain statutory rights. Or there may be some definite questions of fact, such as the date of the creation of a tenancy, in regard to which he ought to have an opportunity of presenting his case to the Commissioners. Again, it is possible that the case which the applicant has to meet may not depend on any particular issue of law or fact, but upon the exercise by the Commissioners of the very wide discretion entrusted to them in the discharge of their duties in regard to the advancing of public money. In such a case the applicant ought to be afforded an opportunity of endeavouring to satisfy the Commissioners that their discretion should be exercised in his favour. The circumstance that they are primarily an administrative body, exercising a discretion uncontrolled by appeal, renders it all the more necessary that the essentials of natural justice should be observed, when, in the course of administering the statutes, they are called upon to arrive at decisions of a judicial character affecting proprietary rights.

The course of procedure by Provisional Order which was originally adopted by the Commissioners did not offend against the principles of natural justice, inasmuch as the applicant had an opportunity of bringing all the facts of the case before the Commissioners before his application was finally disposed of. The Commissioners are acting in accordance with the decision of the Court in making but one order, and that a final one. Their error appears to me to consist in having omitted, while

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following that decision, to make provisions for the preliminary consideration of the case, on notice to the applicant—a necessity which did not arise where they were proceeding by way of Provisional Order.

For these reasons I concur with my brother Wright in holding that the order under consideration is invalid.

LORD O'BRIEN, L.C.J.:—

The Estates Commissioners, to whom no *mala fides* whatever has been imputed, have declined to declare an estate as fit to be regarded as a separate estate for the purposes of the Act of 1903. Are they compellable—I emphasize the word *compellable*—to state their reasons for not having done so? Or rather, were they under a legal *obligation*, was it *obligatory* on them, before they declined to do so, to state the reasons which they believed would justify their action in so declining? Would a refusal to state the reasons on which they were about to act so entirely deprive them of jurisdiction that their decision not to comply with the request made could be challengable on *certiorari* as made wholly without and in excess of jurisdiction? In my opinion, the Estates Commissioners were under no such obligation as is sought to be attached to them. The grounds of that opinion may be shortly stated. What is the object of what, in its essence as distinguished from mere form, is an application to the Estates Commissioners to declare an estate fit to be regarded as a separate estate for the purposes of the Purchase Act of 1903?

It is an application, the main object of which was that public money, State money, should be available for the purchase of land. It is an initial step to attach jurisdiction to put the provisions of the Act of 1903 in force; but, as to the attaching of jurisdiction, the Estates Commissioners have, in my opinion, an absolute discretion. But let me see what the precise legal aspect of the application is. It is not a *lis*; it is not a suit *inter partes*; it is not an application to do anything which in its nature is, strictly speaking, a judicial act. It is, in my opinion, merely an application to discharge an administrative function, as to which the Commissioners have an uncontrollable discretion. That is, I think,

plain; and the maxim *audi alteram partem*, and other maxims of a cognate nature, have no application to such a proceeding.

All maps, agreements, and documents required by the rules and settled practice were supplied to the Commissioners. That the application is not a *lis*, that it is not a suit *inter partes*, that the granting of the application would not be, as Mr. Ronan so emphatically, and in my opinion rightly, contended, in the nature of a judicial act, in the strict sense of that expression is, I think, made manifest from the judgments in *Weir's Estate* (1); and if the granting of such an application would not be a judicial act, it would appear to me that, *a fortiori*, the refusal to grant such an application, the refusal to modify in any way the existing position, would not be a judicial act. The inquiries to be made in such a case, antecedently to declaring an estate to be a separate estate, are wholly different from inquiries made in the ordinary course of the common law or of equity for the purpose of determining the rights of parties. See the observations of Fitz Gibbon, L.J., and of Holmes, L.J., in their judgments in *Weir's Estate* (1). All and every description of inquiry can be made, whether involving hearsay evidence or not. As to what character of inquiry should be made, the Estates Commissioners have an absolutely uncontrollable discretion. It is only requisite to read what Fitz Gibbon, L.J., and Holmes, L.J., said in reference to this to see how wide-ranging, how confidential, and how delicate, the character of the inquiries may be. Lord Justice Fitz Gibbon is reported to have said:—[The Lord Chief Justice read from and including the words "in order to" at the foot of page 178 of the report of *Weir's Estate* (1) down to and including the words "every one else" on p. 179]. Fitz Gibbon, L.J., no doubt, used the words "by way of judicial determination"; but, in my opinion, he used these words in the sense of absolute determination as distinguished from provisional. The whole context of his observations shows that this is what he meant. He was pointing out the necessity of a final as distinguished from a provisional declaration; and I think it plain also that the Lord Chancellor used the expression "judicial discretion" in the sense of an honest discretion, not mere capricious conduct, as dis-

(1) [1908] 1 I. R. 161.

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tinguished from judicial action strictly so understood. It must never be lost sight that from start to finish of the case no *mala fides* was imputed. I think the fact that Lord Justice Holmes did not at any part of his judgment use the expression "judicial act," "judicial determination," or "judicial discretion" goes to show that these expressions were used by Lord Justice Fitz Gibbon and the Lord Chancellor in the sense I have suggested.

This inquiry, so indicated, includes many matters of a very delicate character, viz., as to whether there are *bona fide* agreements, and as to whether the relations between landlord and tenant involved real transactions; as to what is the history and character of the estate, as to what is the character and number of the tenants, whether the estate is a congested estate, whether the tenants are likely to lend themselves to illegal combinations and repudiation of liability, and many delicate matters of this kind. So important did Holmes, L.J., who said nothing whatever as to "judicial determination," think these inquiries, that he would not place any limit upon them. He is reported to have said:—"I have no doubt that the statute contemplates that the first thing to be done after filing the originating application is to make the declaration provided for by section 98 (1), if, as a result of their inquiries, they are of opinion that such declaration ought to be made. It is for the Estates Commissioners to determine in each case the nature and extent of these inquiries. If I were to attempt to define or illustrate them, I might only mislead; nor is the Court asked to do so" (1).

The inquiries suggested by the Lords Justices—and in the character of, and necessity for, these inquiries, it is plain the Lord Chancellor agreed—appear to me to be absolutely essential. Anyone that knows anything about Ireland must know that such inquiries are vitally necessary. It cannot be, in my opinion, reasonably contended that inquiries are to be confined to those who are interested in the money being procured, being advanced. Inquiry should certainly range beyond both intending vendor and intending purchaser; and if the result of inquiry that might necessarily be of a secret and confidential character

(1) [1908] 1 I. R., at p. 188.

should be communicated to the applicants for the money, the obligation so to do would, or might in many cases, prevent all information being given to the Commissioners, and render the inquiries quite abortive. I respectfully quite agree with the Lord Chancellor and the Lords Justices as to the character and extent of the inquiries to be made, and as to the absolute necessity for such inquiries. What, then, is the result of this character of inquiry? It would appear to me that, if the act to be done is a judicial act, that is to say, if the thing to be done by the Estates Commissioners is to be done by them as with the obligations attaching to the position of Judges, in the ordinary sense of the word "Judges," then the proceeding is a judicial proceeding; they should hear and determine in judicial fashion; but, if they are not compellable to proceed judicially, that is to say, if information may be received and acted upon though not given upon oath; if the inquiries can be made by the Estates Commissioners themselves, irrespective of the persons interested, and are of the wide-ranging, confidential, delicate, and secret character I referred to, the power to make such inquiries shows that the act to be done is not a judicial one.

The function and authority of the Estates Commissioners in making a declaration that an estate may be dealt with as a separate estate for the purposes of the Act of 1903, are wholly different, in my opinion, from that of Judges in doing a judicial act. The Estates Commissioners are, in so doing, in a position analogous to that of intending private purchasers, who may walk in upon an estate, look around them, make any such inquiries as they think fit, and bid for and purchase, or decline to purchase, the estate as seems good to them. To say that the Estates Commissioners have the obligation of "Judges" in the ordinary sense of the term "Judges," and that they must act "judicially" at every hand's turn, is, in my opinion, wholly unsustainable. I do not at all go so far as to state that, in some phases of their duty, the provisions of the Land Act of 1903 and the incorporated Acts are not mandatory upon them, or that their duties can never be of a judicial character; but I most certainly am of opinion that in reference to the question of declaring or refusing to declare an estate as "fit to be regarded as a separate estate for

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the purposes of the Act of 1903, the Estates Commissioners have an absolute discretion. Let me ask this question :—Suppose the Estates Commissioners sent down their inspector to inspect the estate and make a report about it, and the Estates Commissioners honestly resolved to act upon the report, could they be compelled —would they be under any obligation—to state their reasons for being about to do so? It is to be borne in mind that there is no appeal provided by the Act of Parliament, which fact would go to show that the function as to declaring an estate fit to be regarded as a separate estate for the purposes of the Act of 1903 is for the Commissioners exclusively, and does not involve the doing of a judicial act in the ordinary accustomed sense of the term. I do not think that the question here is at all a question of law within the meaning of the 23rd section of the statute; but, in any event, recourse was not had to it. Indeed, the section, in my opinion, makes against, rather than for, the applicants. It shows that the Estates Commissioners *as a body*, as a *whole*, that each and every member of the Estates Commissioners, need not have any judicial qualification, and that their tenure is different from that of an ordinary Judge. Suppose that recourse could be had to this 23rd section, would *certiorari* lie? This question was not raised or argued. I merely wish to guard myself.

My view as to the absolute discretion of the Estates Commissioners in declaring an estate as fit to be regarded as a separate estate for the purposes of the Act of 1903 is, I think, borne out by the history of land-purchase. It could not, I think, with any show of reason, be contended that the Board of Works, as the authority to advance money for the purchase of holdings, had not an absolute discretion to grant or refuse the advances; that, if they refused, they could be compelled to disclose their reasons for such refusal; see Land Act of 1870, Part III generally, and in particular sections 44 and 45; and observe that the entirely discretionary language of these sections becomes the more apparent when compared with the mandatory terms of section 46.

It is to be remembered, too, that all the powers of the Board of Works in reference to advances to tenants for the purpose of the purchase of their holdings were transferred to the Land Commission by section 35 of the Land Law (Ir.) Act, 1881. If the

Board of Works could not be compelled to disclose their reasons for refusing to advance State money—and I take it to be absolutely plain that they could not be so compelled—is the Land Commission, the representatives of the Board of Works as regards the advances of State money, or the Estates Commissioners, a branch of the Land Commission, compellable to proceed *judicially* in the strict sense of the word; that is to say, judicially, as distinguished from the exercise of absolute discretion in declaring an estate fit to be regarded as a separate estate for the purposes of the Act of 1903, wherein, in Part V, section 98, sub-section 1, the expression "estate" is thus defined: "The expression 'estate' in Part I of this Act means any lands which the Estates Commissioners may declare fit to be regarded as a separate estate for the purposes of this Act"? I do not think they are so compellable.

It is not, I think, irrelevant to advert to section 26 of the Act, the Land Act of 1881, where it is provided that any estate may be purchased by the Land Commission for the purpose of re-selling to the tenants of such estate their respective holdings, if the Land Commissioners are satisfied of the expediency of the purchase, &c.

If they declined to advance money on the ground that they were not satisfied of the expediency of so doing, could it be argued that they could by any proceeding whatever, by tenants on the estate or otherwise, be compelled to state their reasons for not deeming such an advance for the purposes of purchase expedient? I refer to this section merely to show how absolute the discretion of the Land Commissioners was as regards the purchase of estates. During the argument I asked Mr. Campbell, who argued the case with so much ability and vigour, whether it was contended that the Estates Commissioners were bound to hear counsel. The answer was in the negative; but it was contended that such difficulties as from time to time arose should be communicated to the parties interested, landlord and tenant, by the Estates Commissioners. This would in my opinion lead to practically interminable delay in dealing with the very many estates throughout Ireland which must come within the sphere of the action of the Estates Commissioners, and would

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trench upon the absolute discretion, which I think is vested in the Commissioners, as to making the declaration in question, and as to the mode and manner of inquiry antecedent to the making of that declaration.

But with reference to the claims of natural justice, so much and so often adverted to, I may state that Judges whether on the Common Law or Equity side, are not compellable to state the reasons upon which their judgments are about to be founded; nor are they compellable, when they decide, to state the grounds of their decision; though it is most undoubtedly customary to do so. It would appear to me to be incumbent upon those who contend that any such obligation as is contended for attaches to the Estates Commissioners to point to the language in the Act of Parliament that creates such an obligation. As I understood the argument, no such attempt was made; but certain familiar maxims of our law were appealed to, which, in my judgment, under all the circumstances of this particular case, having regard to the special and peculiar authority, position, and functions of the Estates Commissioners, afford no ground to induce us to grant the motion. Everything contemplated by the statute and rules, as I said in an earlier part of my judgment, has been supplied to the Commissioners; and, in my opinion, there is no statutory or common law obligation incumbent on the Commissioners, under the circumstances of this particular case, to state the reasons, the grounds, upon which they are about to act. The result, the right of challenge and power of review, might of course be wholly different if the Estates Commissioners made what might be described as a speaking order; that is to say, if they set out the grounds of their decision, and those grounds were illegal, not warranted by law. *Weir's Estate* (1), where by admission the ground of, the special reason of, the decision was made manifest—might supply an illustration; and a case of another kind might also supply an illustration—the instance of arbitration and award. It is competent for an arbitrator to make an award which would be good if no reasons were assigned, but would be invalid if the reasons were set forth, and were bad.

(1) [1908] 1 I. R. 161.

We had in this country a remarkable instance of such a case; a case where a very eminent Judge, now no more, made, in his professional day, a speaking award which had every sanction of moral justice, but when challenged in a Court of law was held to be bad; because the award, while speaking moral justice, spoke bad law.

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I am of opinion that this motion should be refused. To my mind it is absolutely plain that the Estates Commissioners in no way stated their reasons for their inability to declare the lands fit to be regarded as an estate for the purpose of the Irish Land Act, 1903. They made no speaking order. They did not do so in their formal refusal; nor did they do so through the letter of Mr. Drennan, of July 13th, 1899. Mr. Drennan may, in the letter of July 13th, have made some courteous suggestions; but certainly these suggestions were not a statement of the grounds of inability to make the necessary declaration; and I will not discuss these suggestions, because, if I did so, I should consider that I was doing an injustice to the Commissioners, and was evading the decision of the real issue in this case. However, this is not insisted upon; nor was it put forward in the argument. I wish to reiterate, before I conclude, that no *mala fides* was imputed. The view I take absolves me from the necessity of considering whether in any aspect of this case procedure by *certiorari* is applicable. However, the point was not made, at least not expressly made. I merely desire to guard myself.

Solicitors for the prosecutors: *Crookshank, Leech, & Davies.*
Solicitor for the respondents: *William Alexander.*

C. N. K.

K. B. Div. Probate. 1910. Nov. 17.

In the GOODS of CHARLES GILBERT (1).

Practice—Condemning will on motion—Non-appearance of party interested—Grant of administration, notwithstanding alleged will.

The Court has power to condemn a will upon motion. But where a party interested failed to appear on such motion, though served with a citation, and personally served with notice of the motion, and not being professionally advised, appeared to be ignorant of her rights, the Court granted administration notwithstanding the alleged will.

Brennan v. *Dillon* (I. R. 7 Eq. 215; 8 Eq. 94) approved of.

Motion on behalf of Anna Maria Gilbert, widow, to condemn a will alleged to have been made by her late husband, Charles Gilbert, deceased, on the 1st February, 1906, and that letters of administration, as in case of intestacy, of his personal estate and effects be granted to her.

The deceased died at Aughrim, county Wicklow, on the 20th July, 1910, leaving his widow but no children him surviving. The alleged will was first brought to the notice of Mrs. Gilbert, widow of deceased, on the day of the funeral by the rector of the parish, to whom it had been handed by Mrs. Young, a sister of the deceased, to be read at the funeral. Mrs. Young afterwards stated that she accepted no responsibility in respect of the estate of the deceased, and disclaimed all interest therein. Under the alleged will Mrs. Gilbert was left £100, the residue of the estate being given to Mrs. Young. Mrs. Young's husband was one of the witnesses. It was apparently duly executed and attested. On the 2nd August, 1910, a caveat was entered on behalf of Mrs. Gilbert. Subsequently a correspondence took place between Mrs. Young and the solicitors for Mrs. Gilbert, from which it appeared that Mrs. Young thought she had no claim to any share of the assets, as her husband was an attesting witness. A citation was served on Mrs. Young on the 10th October, but no appearance was entered for her. The estate did not exceed £500.

(1) Before Madden, J.

It appeared that if the will were proved, Mrs. Young would take a small share under the partial intestacy, and that of this she was not apparently aware.

W. Gibson, for the applicant:—

Mrs. Young has been cited to come in and prove the will, and has failed to do so. This has been regarded as a strong fact in all the cases. The Court can either condemn the will on motion, as in *Brennan* v. *Dillon* (1), or confine itself to making a grant of administration, as in case of intestacy, to the next-of-kin, notwithstanding the existence of an alleged will, as in *In the Goods of Quick* (2).

MADDEN, J.:—

I should not have any difficulty in following the decision in *Brennan* v. *Dillon* (1), and condemning the will if this lady had been represented by a professional adviser. But I am not sure that she understands her position, because she states in the correspondence that she has no interest under the will, although she in fact has a substantial interest. I shall accordingly confine myself to making a decree for administration, notwithstanding an alleged will.

Solicitors for the applicant: *Mackay & Connolly.*

A. E. C.

(1) I. R. 7 Eq. 215; 8 Eq. 94. (2) [1899] P. 187.

K. B. Div. 1910. Nov. 7, 8.

THE KING (ATTORNEY-GENERAL FOR IRELAND) *v.* J. WALKER CRAIG, ESQ., K.C., COUNTY COURT JUDGE FOR THE COUNTIES OF FERMANAGH AND MONAGHAN (1).

Jurors—Revision—Jurors' Qualification (Ireland) Act, 1876 (39 & 40 *Vict. c.* 21, *s.* 2)—*Tenant-purchasers—Freeholders in occupation of qualifying lands—Qualification—"Clear income of* £10 *by the year"—Mode of ascertaining "clear income."*

A freeholder, having in his own name or in trust for him a clear income of £10 by the year, in lands and tenements of a freehold tenure, is qualified by the Jurors' Qualification (Ireland) Act, 1876 (39 & 40 Vict. c. 21), sect. 2, sub-sect. 1, as a juror for the county in which they are situate, if he resides therein; and tenant-purchasers and other freeholders are not disqualified if, having such clear income, they are in occupation of qualifying lands rated at less than the net annual value fixed for the county where such lands are situate under the first schedule of the Act.

The manner in which the "clear income" of freeholders in occupation of qualifying lands should be estimated or ascertained, considered. In estimating the clear income of a tenant-purchaser two main elements should be considered—(1) the value of the lands, and (2) the amount of the purchase-annuity payable by the tenant-purchaser.

MOTION to make absolute a conditional order that a writ of *certiorari* should issue directed to J. Walker Craig, Esq., K.C., County Court Judge, to remove into the King's Bench Division here, for the purpose of being quashed, the adjudications of the County Court Judge at the Courts held by him at Carrickmacross in the county of Monaghan, on the 1st October, 1910, for the revision of the general lists of jurors for the Barony of Farney in that county, by which adjudications he expunged from the said lists the name of Patrick Agnew, a freeholder in occupation of lands within the Barony, for the reason that he was in such occupation, and was not rated in respect of his said lands under the Acts for the valuation of rateable property in Ireland

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

at the annual value of £40, and by which he expunged from the lists the names of other persons appearing on the lists to be freeholders in occupation of lands within the same barony for the same reasons, and that a writ of mandamus should issue directed to J. Walker Craig, Esq., K.C., County Court Judge and Chairman of Quarter Sessions in and for the county of Monaghan, and to the Clerk of the Crown and Peace in and for the said county, commanding them, according to their respective duties in that behalf, to reinstate in the lists the names expunged as aforesaid, and do all other acts and things necessary for the purpose of restoring the said names to the said lists.

On the 24th September, 1910, the respondent, His Honour Judge Craig, County Court Judge of Fermanagh and Monaghan, at the opening of the Revision Sessions at Enniskillen, stated that, in pursuance of a letter of the Lords Justices of the year 1877, and of section 2 (3) of the Jurors' Qualification (Ireland) Act, 1876 (39 & 40 Vict. c. 21), he had decided to strike out of the jurors' lists the names of the freeholders in occupation, the net annual value of whose lands did not exceed £40. The letter referred to by the learned County Court Judge and the reasons for his decision will be found at pp. 41–44, as referred to and stated in the respondent's affidavit showing cause.

The affidavit of Robert Ellis Bailie, Crown Solicitor for Monaghan, on which the motion for the conditional order was grounded, stated that the deponent attended at the Revision Sessions for the Barony of Farney, in the county of Monaghan, held on the 1st October at Carrickmacross; that at the sitting of the Court the respondent stated he would follow the decision he had given at Enniskillen, and, in pursuance of that decision, struck out of the jurors' lists the names of all tenant-purchasers in occupation of lands rated at less than £40; that in the case of Patrick Agnew, No. 2 on the list, objection was taken by the deponent, but that the respondent over-ruled the objection on the ground that Agnew's case came within the above decision; that all persons appearing on the lists of the Barony as struck out, without official disqualification, were tenant-purchasers in occupation of lands rated at less than £40; that at the Revision Sessions for the Barony of Cremorne, in the same county, held on

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the 8th October, the respondent revised the jurors' lists upon the same principle, and that all persons appearing as struck out on the latter lists, without official disqualification, were tenant-purchasers in occupation of lands rated at less than £40.

The following note was appended by the respondent to the jurors' lists for the Barony of Cremorne :—

"Tenant-purchaser freeholders struck out on the foregoing list, against whose name no objection appears on the margin, were all struck out by me on the ground that they were occupiers of their freehold lands, and that their ratings were under £40. I state this in compliance with a request made to me in the name of the Attorney-General.

"Tenant-purchaser freeholders rated under £15 were officially objected to, and were struck out on the grounds that if the amount of the annuity for which they were liable to the Land Commission were deducted from the amount of the rating, the latter, and probably the clear income of the freeholder, would be reduced below £10. This is merely a rough working rule, and the propriety of it may be questioned. If the view I have acted on as to tenant-purchaser freeholders rated under £40 be held erroneous, it would seem very desirable to have the principle authoritatively laid down on which the income (*i.e.*, the profits) of the freehold farmer are to be arrived at for the preparation and revision of the jurors' lists.

"J. WALKER CRAIG, *8th October*, 1910."

The affidavit of the respondent showing cause contained statements of the grounds upon which the learned County Court Judge based his decision as to the qualification of freehold occupants :—

"2. I take blame to myself for not having given my attention sooner to the question of the qualification of jurors, which is the subject-matter of the said conditional order. When I was appointed a County Court Judge in the year 1897, the Jurors' Qualification (Ireland) Act, 1876, had been in operation for over 20 years, and I was led to assume that all the important questions arising upon the construction of the Act had been already fully considered and settled. So far back as 1890 large numbers of

(tenant-purchasers) freeholders, rated from £10 up to under £40, had come into the jurors' lists without objection, as I have ascertained by referring to the lists of that year.

"3. Early in the month of July last, at a meeting of the County Court Judges, Judge Curran brought under the notice of those present printed copies of what purported to be, and I believe was, a letter written in the names of Their Excellencies the Lords Justices to the Clerk of the Union of Ballymahon, and dated the 14th June, 1877, and I believe that they were all satisfied that the view expressed in the said letter was a correct statement of the law.

"4. The qualification of occupying freeholders to serve on juries is a matter of very great and far-reaching scope in the counties of Monaghan and Fermanagh, of which I am County Court Judge, because the farms in said counties are usually of very small valuation, and because land purchase has taken effect over extremely wide areas of both said counties. For this and other reasons I considered it my duty to communicate with the Government upon the subject, and I soon after wrote to the Under-Secretary a letter. I received the usual formal acknowledgment of said letter, and later on a reply stating that His Excellency the Lord Lieutenant had been advised to take no action. The last-mentioned letter did not contain any suggestion that the opinion as to the law expressed in the said letter of 14th June, 1877, was inaccurate, and, as a matter of fact, I did not receive any intimation that the present law officers took a different view of the construction of the statute, until I had concluded the revision of the whole of the jurors' lists in county Fermanagh that came before me.

"5. Believing that the said letter of 14th June, 1877, represented the opinion of the law officers of that day, and that the present law officers still held to the views expressed therein, and having formed the same opinion myself, I considered it my duty to apply the law as so stated to the revision of the jurors' lists in my said counties at the late Revision Sessions.

"6. Referring to the affidavit of Mr. Bailie, I say that the freeholders struck out by me from the jurors' list were struck out on the ground that they were freeholders in occupation rated under £40, and not on any ground of their being tenant-purchasers, although,

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as a matter of fact, most, and perhaps all, of such freeholders, were tenant-purchasers. The revision proceeded in respect of all freeholders who were described as farmers upon the assumption that they were occupiers of their farms unless the contrary was stated. This was done for the sake of convenience, and to save time, and no suggestion was made during the revision that any of the freeholders struck out by me were not in occupation of their freeholds.

"7. I am informed and believe that, in addition to the said counties of Monaghan and Fermanagh, the jurors' lists have been revised during the present year in the counties of Cavan, Leitrim, and Meath upon the principles laid down in the said letter of 14th June, 1877; and that in King's County, and the counties of Longford and Westmeath, the jurors' lists were so revised not only this year, but also last year. As to the remaining counties in Ireland, I have no information, and have sought none; nor did I seek the information above stated as to the counties specifically named by me.

"8. When Mr. Bailie appeared in Court at Carrickmacross, as stated in his said affidavit, and objected to my striking out the name of Patrick Agnew, the only reason stated by him for his so objecting was that the law officers differed from my opinion; but when I asked him to state the grounds of their opinion, or to argue the question from their point of view, he made no attempt to do so.

"11. Referring to my signed note at the end of the jurors' lists for county Monaghan—prior to my becoming County Court Judge for said county, freeholders in occupation of their holdings rated at £10 and upwards had been retained on the revised jurors' lists, and this was continued at the revision of the years 1897 and 1898. In the year 1899, as I believe, the late Mr. James Daly of Carrickmacross, then Member of Parliament for the south division of said county, appeared in the Revision Court at Carrickmacross, and made an appeal to me to relieve the poorer members among his constituents from the burden of serving as jurors. Holding the views I then did as to the construction of the said Act, I nevertheless thought I could meet his appeal to the extent of raising the qualification to £15, on the ground that tenant-purchaser

freeholders were liable to the Land Commission in respect of their annuities, and that the deduction of these from holdings rated at less than £15 might fairly be considered as likely to reduce the income of their freehold below £10. This, of course, was a mere rough working rule. I am aware that a County Court Judge in another county put up this limit to £25; and if I felt myself justified in adopting the same limit (assuming that the construction of the Act hitherto adopted in practice was correct), I would gladly do so, as thereby the large majority of ignorant and unsuitable jurors would be removed from the lists. I have applied this £15 limit to the rest of the county of Monaghan, and also to the county of Fermanagh, and from that time forward official objections were taken to freeholders rated under £15."

The following is the text of the letter from the Lords Justices referred to by the learned County Court Judge in his judgment at Enniskillen, and exhibited in the affidavit showing cause:—

"DUBLIN CASTLE,

"14*th June*, 1877.

"SIR,—With reference to the extract from the minutes of the Board of Guardians of the Ballymahon Union, of the 24th ultimo, relative to the preparation of jurors' lists, which had been forwarded to this department by the Local Government Board, I am directed by the Lords Justices to acquaint you for the information of the guardians that Their Excellencies are advised that the freehold and leasehold qualification referred to in the first and second clauses of the 2nd section of the 'Jurors' Qualification (Ireland) Act, 1876,' does not refer to the case of a freeholding or leaseholding occupier; where a freeholder or leaseholder is in actual occupation of the freehold or leasehold premises he should be treated under clause 3 of the 2nd section.

"Their Excellencies are further advised that the freehold and leasehold qualification, which should be inserted in the ninth column of the list of jurors, is the clear annual income derived by a freeholder and leaseholder (whether he be immediate lessor or more remote) from the freehold or leasehold premises, provided that he is not in actual occupation thereof. The clear annual

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income is to be arrived at by deducting the rent payable by him in respect of the premises from the rent received therefrom. If this amount be £10 or upwards in case of a freeholder, or £20 or upwards in case of leaseholder, his name should be inserted in the jurors' list.

"Their Excellencies are also advised that where the same person has different kinds of qualification, the particulars of each should be shown under its respective heading in the jurors' lists.

"Your obedient servant, &c.,

"T. H. BURKE.

"The Clerk of the Union, Ballymahon."

The evidence before the Court of King's Bench consisted of the affidavit of Robert Ellis Bailie, and copies of the jurors' lists for the baronies of Farney and Cremorne, Monaghan, therein referred to, the respondent's affidavit showing cause, the correspondence therein referred to, and a newspaper report of the respondent's judgment at Enniskillen exhibited in the latter affidavit. Section 2 of the Jurors' Qualification (Ireland) Act, 1876 (39 & 40 Viet. c. 21), provides that:—"Every man being a subject of the King, between the ages of twenty-one and sixty-five years, residing in any county or in any borough having a separate Court of Sessions of the Peace, or a Court of Record for the trial of civil actions (1), who shall have in his own name or in trust for him a clear income of £10 by the year in lands and tenements of freehold tenure situate in such county or borough, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee-simple, or in fee-tail, or for any life or lives whatsoever; or (2) who shall have a clear income of £20 by the year in lands or tenements situate in such county or borough, held by lease originally made for an absolute term of not less than twenty-one years, whether the same shall or shall not be determinable on any life or lives; or (3) who shall be, either in his own name or as a member of a firm or co-partnership, rated for the relief of the poor in respect of lands, tenements, or hereditaments within such county or borough, of the net annual value fixed for such county or borough in the first

schedule to this Act . . . shall, if residing in any such county as aforesaid, be qualified and liable (save as exempted or disqualified) to serve on all juries," &c. The net annual value fixed by sch. 1 to the Act for the counties of Fermanagh and Monaghan is £40. Section 4 of the Act provides that the clerk of the peace shall prepare the jurors' lists in accordance with the form in the third schedule, and section 5 provides that precepts for the return of jurors' lists shall be in the form given in the third schedule to the Act. The form of jurors' list prescribed in the third schedule to the Act provides several columns for the following matters—(1) Exemption or disqualification from age or otherwise; (2) number on list; (3) surname; (4) Christian name; (5) place of abode; (6) barony, &c., where place of abode situate; (7) nature of qualification; (8) title, calling, or business; (9) amount of freehold or leasehold property; (10) annual value of property; (11) place of property.

The conditional order for *certiorari* was obtained on the ground that the adjudications of the respondent in the case of Patrick Agnew, and the expunging from the lists for the Baronies of Farney and Cremorne, county Monaghan, of all freeholders in occupation, not rated at the annual value of £40, were without and in excess of jurisdiction, and contrary to the statute 39 & 40 Vict. c. 21, sect. 2, the said Agnew and other persons having, respectively, clear annual incomes of £10 by the years in respect of their lands held by freehold tenure in the county of Monaghan.

The Attorney-General (*The Right Hon. Redmond Barry, K.C.*), (with him *The Solicitor-General* (*Charles A. O'Connor, K.C.*), and *Linehan*), for the prosecutor:—

The old statutes regulating the qualifications of jurors in Scotland and England are, respectively, the 6 Geo. 4, c. 22, and the 6 Geo. 4, c. 50. I have been unable to find any Irish statute of a date corresponding to these two statutes. The words used in the Jurors' Qualification (Ireland) Act, 1876, are substantially the same as the words in these statutes; and, in England and Scotland, occupation did not effect a disqualification. The learned County Court Judge has held that the Jurors' Qualification (Ireland) Act (39 & 40 Vict. c. 21, sect. 2 (1)), does not apply to the case of

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a freeholder or a leaseholder in occupation; but the words "place of his freehold property," occurring in the precept given in the third schedule to the Act, show that the Legislature contemplated the case of the freeholder in occupation. The Franchise Acts have a similar effect: 4 Geo. 4, c. 55, s. 80; 13 & 14 Vict. c. 69, s. 2.

Ronan, K.C., D. M. Wilson, K.C., and *Calvert*, for the respondent:—

The first question in the case, *i.e.*, whether the qualification applies in the case of a person in occupation of the qualifying lands, is a pure question of law: 6 Geo. 4, c. 50: Encyclopædia of Local Government, vol. iv., p. 80. The qualification cannot be ascertained by rating alone: outgoings, such as rent, interest, &c., must be considered. The Juries (Ireland) Act, 1871, repealed the 3 & 4 Wm. 4, c. 91, and substituted a rating qualification, *i.e.*, a net annual value of £20 in the counties of Fermanagh and Monaghan. The purpose of the Act of 1876 is explained by the preamble. If the Crown be right, the effect of the Act of 1876 is to replace upon the lists the very persons whom the Juries Act of 1873 (34 & 35 Vict. c. 65) relieved from the Juries Act of 1871. The lists have never been prepared as required by law. Putting down the rating is not putting down the income: the two can never be the same; the valuation has no reference to the income, for it is the same whether the rent paid be nominal or excessive. The duty of the County Court Judge is to test the qualification of every person returned on the lists (Juries (Ireland) Act, 1871, sect. 12). The second question is, what is the true construction of sect. 2, sub-sections 1, 2, of the Act of 1876 (39 & 40 Vict. c. 21)? "Clear income" is the same as the "income above reprizes" of the old statute: Encyclopædia of Local Government, vol. iv., p. 79). "Reprizes" is defined in Termes de la Ley, and in Stroud, p. 1725. The meaning of income in settlements is discussed by Lord Alverstone in *Bateman* v. *Faber* (1). There are two qualifications provided by the statute: one is a rating qualification, the other is not. The rating qualifi-

(1) 83 L. T. (N. S.) 7.

cation does not apply to sub-section 2, but does apply to every case where the person occupies the qualifying lands. It was created by the Act of 1871, was raised by the Act of 1873, and still further raised by the Act of 1876. The object of the other qualifications was to bring in persons who were not in occupation; but, as the test of "clear income" was impossible in the case of the occupier, the Act left the occupier to the rating test. If the same meaning be attached to "rent" as is attached thereto under the statutes of limitation, all difficulty disappears. Rent paid by tenants is "income out of land": rent-charges, &c., are "income out of rents." Rent is not mentioned in sub-section 2, because it is not usual to create rent-charges out of chattel interest.

The Solicitor-General, in reply:—

There are two questions in the case: (1) what is the qualification, and (2) by what means is "clear income" to be determined? The first is purely a question of the construction of the Act. The words "clear income of £10 by the year" have the same meaning as the words "£10 by the year above reprizes" in 3 & 4 Wm. 4, c. 91. The same words occur in 6 Geo. 4, c. 50, and the precept to the Act translates the words. The precept to the English Act of 25 & 26 Vict. c. 107, is in the same terms. The Act of 1876, 39 & 40 Vict. c. 21, adopts the "translation" of the precept, and the words of qualification therein are equivalent to the qualification in 3 & 4 Wm. 4, c. 91, and in 6 Geo. 4, c. 50. As to the second question, every entry in column 7 of the form of list given in the third schedule to the Act of 1876, 39 & 40 Vict. c. 21, should indicate whether the person is a freeholder or leaseholder, *e.g.*, by the letters "f" and "l." The Judge has himself, in his affidavit, suggested a working rule, *i.e.*, £15, which he could have adopted in the case of freeholders in occupation.

PALLES, C.B.:—

The jurors' list must be complete on the 1st December (1). The case is therefore so urgent that we are of opinion that we should not defer judgment.

(1) 34 & 35 Vict. c. 65, s. 13.

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I desire for myself to say that the administration of justice is indebted to Judge Craig for calling the attention of the Court to this important matter, because the mode in which the list of jurymen has, up to the present, been prepared in this county is not in accordance with the statutes. One of the columns which the statute directs the list to contain, viz., that for "the amount of freehold and leasehold property," has been wrongly filled up. Mr. Ronan argued that the consequence of this mistake is that there was not in reality any list before the Judge. I am, however, of opinion that there was a list which, although imperfect, was sufficient to give him jurisdiction, and to impose upon him the obligation to revise it in accordance with the statute. Of course I agree that if that were not so, it would be impossible for us to issue a writ of mandamus directing the Judge to revise the list.

The main question before us is one of law. What is the true construction of section 2, sub-sections 1 and 2, of the Jurors' Qualification (Ireland) Act, 1876? In order to answer this question, it is necessary shortly to refer to two previous Acts dealing with the subject of juries in Ireland. I have a difficulty in taking into consideration the English Acts to which we have been referred; I prefer to base my judgment entirely upon the construction of the Irish Acts.

I attach great importance to section 1 of 3 & 4 Wm. 4, c. 91, which enacts that every man between the ages of twenty-one years and sixty years, residing in any county in Ireland, who shall have in his own name, or in trust for him, within the same county, £10 by the year above reprizes in lands or tenements, or in rents issuing out of any lands or tenements, or in lands, tenements, and rents, taken together, in fee-simple, fee-tail, or for the life of himself or some other person or persons, . . . shall be qualified with respect to property, and shall be liable to serve on juries."

As the Solicitor-General has pointed out, the precept for returning lists of jurors (the form of which is given in Schedule A to that Act) requires that "every man who has in his own name, or in trust for him, a clear income of £10 by the year in lands or tenements situate in the county, or in rents issuing

out of any such lands or tenements, or in such lands, tenements, and rents taken together," shall be returned by the Collectors of Grand Jury Cess in the county to the Clerk of the Peace as qualified to act as juror. That is to say, the words describing the qualification in section 1 of the Act are repeated in the precept. Taking that Act alone, I have no doubt it would be impossible to so construe it as to exclude a freeholder from the list merely by reason of his being in occupation of the qualifying lands. To do so would be to exclude freeholders in occupation of large demesnes within the county—a result contrary to the words, and apparently to the policy, of the Act, and this without any reason arising from matter on the face of the Act, because even the argument of Mr. Ronan, as to the construction of the Act of 1876, based upon the qualification by reason of being rated for lands of a specified rateable valuation, could not have arisen in reference to this Act of 1833, as it does not confer any such qualification. Therefore, I hold that that Act does not contemplate the exclusion of freeholders in occupation; and consequently that the "net income" of such a person is capable of being ascertained under that Act. That "clear income" could not be ascertained merely by taking the actual annual profits as the basis of the calculation, as the qualification could not depend on the accidents of seasons, or on the variations of skill in farming of the occupiers. To ascertain the net income, I should have adopted the principle applied under Valuation Acts in England to the "hypothetical tenant." I should separate an occupying freeholder into two persons—a hypothetical tenant and a hypothetical landlord—and the income issuing out of the lands could thus be ascertained by asking the question, What rent would be given for the lands by a reasonably skilful and careful tenant? Having ascertained that, and having deducted from it everything included in the word "reprizes," the difference would represent the clear income within the meaning of the Act.

The next Act to which I wish to refer is the Juries Act, 1871—Lord O'Hagan's Act. It abolished all previous qualifications, for which it substituted the being rated for lands of a specified rateable value as the sole qualification. The freeholder qualification ceased to exist. This Act was followed by an outcry that the

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rating qualification (£20 in this county) was too low; and by the Juries Act of 1873 this qualification was raised to £30. Then the Jurors' Qualification (Ireland) Act, 1876, recites that by the Act of 1873 temporary provisions were made altering and raising the qualification of jurors, and that it was expedient that other and further provisions should be made to alter and *raise the qualification of jurors.* Section 2, sub-section 3, of the Act raised the qualification of jurors in the county of Monaghan to a net annual value of £40. Undoubtedly, the object of the Act was to raise the qualification, and its effect was unquestionably to do so at that time, because then there were few, if any, tenant-purchasers in the country. Since then the extent to which land-purchase has proceeded has been such that, if we bring into the jurors' list as freeholders the class of persons who are the subject of consideration in this case, we shall, by reason of the change in the nature of the qualification, bring in a class which the Act of 1876 intended to exclude. We must, however, construe that Act by reference to the time at which it was passed; and although the effect of our judgment will be to flood the jurors' lists with persons of a class in society who in 1876 were not intended to be put upon them, we must adopt this principle of construction, even though such construction, coupled with events which occurred subsequent to the Act, may defeat its intention. That is a question for the Legislature. I say that—because our decision, taken in connexion with the statutes which have since been passed in reference to Land Purchase, does, in my opinion, defeat the intention of the Act.

Coming now to the construction of section 2 of the Act of 1876, and comparing it with the section which I have quoted from the Act of 1833, I have no hesitation in holding that one of the objects of the Legislature in 1876 was to replace upon the jurors' lists persons who were qualified under the Act of 1833 (3 & 4 Wm. 4, c. 91), subject to two exceptions. First, the net income necessary to the qualification of leaseholders was raised; secondly, for the antiquated words "income above reprizes" the modern words "clear income" were substituted. I, therefore, need not discuss the meaning of "reprizes." I have in the Act of 1876, as there was in that of 1833, a repetition in the precept of the class of

qualified persons; and neither in the words defining the qualification nor in the description in the precept of the qualified persons is there any exception of freeholders in occupation.

Helped as I am by the Act of 1833, it would in my opinion require some assisting context to justify us in excluding *occupying freeholders* from the jurors' lists; and I cannot find any such context any more than it can be found in the Act of 1833. I am, therefore, of opinion that Judge Craig's judgment, in which he held that freeholders who were in occupation of the land yielding the qualifying income were not entitled to be placed on the jurors' list, was wrong in law. I express this opinion with much diffidence, differing as it does from the opinion not only of the able and learned County Court Judge himself (whose opinion I unfeignedly respect), but also as I understand, from that of the general body of the County Court Judges, as well as from that expressed by the Law Adviser to the Crown who has been mentioned.

I have now to deal as well as I can with the request made by Mr. Ronan that I should indicate in a general way how the jurors' lists should be revised in accordance with our decision. It is true that the Judge cannot perform impossibilities; but I shall point out how, even under existing circumstances, the list may be revised in accordance with the law. The difficulties with which the Judge meets arise from the defective machinery supplied by the Act of 1876 for carrying out its provisions. Whatever effect the Act of 1871 may have had upon the quality of the jurors, it undoubtedly provided simple machinery by which that Act might be carried out. The Clerks of the Unions, who, under those Acts, were directed to return the lists, with the assistance of the Poor Rate Collectors, could ascertain from the books in their custody the rating qualification of the inhabitants of their counties; and, therefore, the only information which it was necessary to supply could be stated with perfect accuracy: but when the Act of 1876 introduced the freehold and leasehold qualifications, it did not supply any efficient new machinery. It applied to the ascertainment of the estates in lands of the inhabitants of the county and of their "clear incomes" the old machinery, which was wholly ineffective by reason of the absence of knowledge, in the collectors

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of Poor Rates and of Clerks of Unions, of the particulars which the Legislature required them to state.

It is interesting to compare the Acts of 1871 and 1876. The precept to the former directs the Clerk of the Poor Law Union to return the name of every person rated in respect of lands of the specified "net annual value"; and the only qualification in Form B. of the third schedule is "annual value of rated property." All these particulars necessarily appeared in the Rate Book which was in the custody of this officer.

The third schedule to the Act of 1876 requires the Clerk of the Poor Law Union to return the list with the name of every person who has in his own name, or in trust for him, a clear £10 by the year in lands and tenements of freehold tenure, or in rents issuing out of any such lands and tenements, or in such lands, tenements, and rents taken together, in fee-simple or fee-tail, or for any life or lives whatsoever; or has a clear income of £20 by the year in lands or tenements held by lease originally made for an absolute term of not less than twenty-one years. Of many of these particulars the Clerk of the Union can have no knowledge. In the lists of jurors which the poor-rate-collectors are directed to make there are two columns—(1) "The nature of qualification," the answer to which would depend upon whether a juror was a freeholder, or a leaseholder, or a tenant from year to year—a matter which the rate-collector need not, and probably did not, know; (2) "the *amount* of freehold or leasehold property." These words are used as an equivalent for "clear income," and that is a thing which the rate-collector could not know.

Now, let us see what is the duty thrown on the County Court Judge in revising the jurors' lists. His duty is prescribed in section 12 of the Act of 1871—[His Lordship read the section and continued]—that is to say, he is obliged to ascertain the qualification of each person whose name appears on the list before him. Practically, the only return he receives from the Clerk of the Union as to the qualification is the rating of the qualifying premises. That does not assist him in determining whether the rated occupier is a freeholder or a leaseholder qualified under section 2, sub-sections 1 and 2, of the Act of 1876. However, the Act throws upon him the duty of ascertaining the qualification of

these persons, notwithstanding the imperfect machinery supplied to him for the purpose. How, then, can he obtain the necessary information? As regards tenant-purchasers under the Irish Land Purchase Acts—the class with whom we are concerned here—there are two main elements to be considered—1, the value of the land which they occupy; and 2, the amount of the purchase instalments which they pay. As to the first, the County Court Judge can ascertain the value of the land in any way which he thinks will be most accurate. He may adopt the Poor Law Valuation as the basis, or he may reduce it, or add to it, in the exercise of his discretion, aided by his knowledge of the district with which he is dealing and his opinion as to the relation which the "valuation" as a whole bears to the actual value of the lands within the county. If, for instance, he thought the valuation was below the actual value of the lands by 15 per cent., he might, in the exercise of his discretion, increase the valuation by 15 per cent.; and, in so doing, he would be entitled to act either on sworn testimony or upon any other information which he might have.

As to the second element—the amount of the purchase instalments—I am informed that particulars of these amounts are, in general, in the possession of the Local Registrar of Title, who generally is the Clerk of the Crown and Peace. An easy way in which the County Court Judge could ascertain the amount of the purchase instalment would be to require the Clerk of the Crown and Peace to prepare a list of all tenant-purchasers in the county, and of the amount of the annual instalments payable by each.

I wish it to be understood that I do not consider it necessary that I should state exhaustively every deduction which may or may not be made by the County Court Judge. For instance, on the questions mentioned of deductions of rates and taxes, or (in the case of a freeholder or leaseholder not in occupation, but in receipt of rent) of agent's fees, I have formed an opinion whether these two elements should or should not be taken into consideration, but I do not think it necessary to express it. The second question cannot arise in reference to the class of persons with whom this application is conversant, freeholders in occupation. The first can easily be determined by the County Court Judge.

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I shall not intrude on his jurisdiction by forestalling his decision. My idea is that the County Court Judge should ascertain the value of the lands in the way which I have indicated, and then make such deductions as he may deem proper. In most cases the main deduction will be the purchase instalment payable to the Land Commission. Information as to that can be had from the Clerk of the Crown and Peace, and in that way it will be possible for the County Court Judges to discharge the very onerous duties which the change of ownership in land in Ireland has cast upon them in administering the Act of 1876.

GIBSON and BOYD, JJ., concurred.

Solicitor for the prosecutor: *Malachy Kelly.*
Solicitor for the respondent: *John S. Finnegan.*

C. N. K.

Appeal. 1910. June 16.

SCOTT *v.* HYLAND (1).

(1909. No. 14,172.)

Civil bill decree—Certiorari—*Appeal pending*—*Practice.*

The Court will issue a *certiorari* to bring up a civil bill decree notwithstanding that notice of appeal from the decree has been served on the plaintiff and lodged.

O'Reilly v. *Coyle* (37 Ir. L. T. R. 10) followed.

EX PARTE APPEAL.

On the 2nd April, 1910, the plaintiff obtained a decree from the County Judge of Antrim, at Lisburn Sessions, for £35 13*s.* 6*d.*, on foot of a promissory note with interest, cash lent, and money paid for the use of the defendant, in an action remitted from the High Court. On the 6th June, 1910, the plaintiff applied to the King's Bench Division for an order for a writ of *certiorari* to remove the decree into the High Court. The plaintiff's affidavit,

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

upon which the motion was grounded, stated that the defendant was absolute owner of two farms of land, which with the chattels thereon he had sold during the proceedings, realizing thereby upwards of £500; that he lived in lodgings in Lisburn, and had no other property available to satisfy the decree. The defendant had served and lodged an appeal against the decree, but had not lodged the amount of the decree or recognizance.

The motion was heard on June 6th, 1910, by the Lord Chief Baron, sitting to hear motions for the Divisional Court; and, having regard to the appeal pending, His Lordship made no rule on the motion.

H. Hanna, for the appellant (the plaintiff), cited *O'Reilly* v. *Coyle* (1), in which the Court of Appeal (Fitz Gibbon, Holmes, and Walker, L.JJ.), after hearing argument from Mr. T. S. M'Cann, made an order in a similar case for a *certiorari* to issue.

He stated that through oversight this case had not been cited to the Lord Chief Baron.

THE LORD CHANCELLOR:—

We will follow *O'Reilly* v. *Coyle* (1).

Leave given to issue certiorari, with £2 2s. costs, to be added to plaintiff's demand.

Solicitor for the plaintiff: *N. Ingham.*

W. G.

(1) 37 Ir. L. T. R. 10.

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Nov. 10, 11.

Appeal.
Dec. 13, 21.

THE KING (LOCAL GOVERNMENT BOARD FOR IRELAND) *v.* KILMALLOCK RURAL DISTRICT COUNCIL (1).

Local Government Board—Powers of—Dairies, Cowsheds, and Milkshops Order, 1908—*Public Health Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 11—*Contagious Diseases* (*Animals*) *Act*, 1878, 1886 (41 & 42 *Vict. c.* 74, *s.* 34; 49 & 50 *Vict. c.* 32, *s.* 9)—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57)—*Sanitary laws—Inspector—Qualification.*

By s. 9 (1) of the Contagious Diseases (Animals) Act, 1886, the powers vested in the Privy Council of making orders under section 34 of the Contagious Diseases (Animals) Act, 1878, were transferred to the Local Government Board, including, *inter alia*, orders for the registration of persons carrying on the trade of cowkeepers, dairymen, or purveyors of milk; for inspection of cattle in dairies; for regulating the lighting, ventilation, cleansing, drainage, and water-supply of dairies and cowsheds; for securing the cleanliness of milk-stores, milkshops, and milk-vessels, containing milk for sale; and for prescribing precautions to be taken for protecting milk against infection or contamination. By the Diseases of Animals Act, 1894, schedule 5, the whole of the Act of 1878, except s. 34, and the whole of the Act of 1886, except s. 9, are repealed. Section 69 of that Act provided that the provisions thereof (s. 35) requiring local authorities to keep appointed veterinary inspectors should not extend to Ireland, and by section 67 the local authorities in Ireland are the boards of guardians of the several poor law unions; this being a re-enactment of the repealed section 81 of the 41 & 42 Vict. c. 74.

On the 17th February, 1908, the Local Government Board, acting under section 34 of the Act of 1878, made an Order entitled "the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1898," for the purposes of that section, and, *inter alia* (Art. 25), provided that the local authorities should, with the approval of the Board, appoint so many inspectors or other officers as might be necessary for the execution and enforcement of the Order, and pay them such salaries as the Board should approve of.

Section 11 of the Public Health Act, 1878, requires every sanitary authority to appoint such sanitary officers as the Local Government Board should in each case direct, with such salaries as the sanitary authority, with the approval of the Board, should determine, and that the Board should assign to such officers their respective duties and functions in "the discovery, or

(1) In the King's Bench Division before PALLES, C.B., and GIBSON and BOYD, JJ.

inspection, or removal of nuisances, in the supply of pure water, in the making or repairing of sewers and drains, or in generally aiding the administration of the sanitary laws within the district."

The Kilmallock Rural District Council declined to put in force in their district the Dairies, Cowsheds, and Milkshops Order, 1908, and the Local Government Board issued a sealed order purporting to be made under section 11 of the Public Health Act, 1878, requiring them, as sanitary authority of the Kilmallock Rural District, to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer of the said district, with such duties and functions in aiding the administration of the sanitary laws as the Board should assign to him, and with such salary as the Rural District Council should determine, with the Board's approval.

The Kilmallock Rural District Council having failed to comply with this Order—

Held, by the Court of Appeal, reversing the Order of the King's Bench Division, that the sealed order was *intra vires*, and that the Local Government Board were entitled to enforce the same by mandamus.

Held, also, by the Lord Chancellor and Holmes, L.J., that the Dairies, Milkshops, and Cowsheds Order, 1908, was *intra vires*.

MOTION on behalf of the Local Government Board to make absolute a conditional order that a writ of mandamus should issue directed to the Rural District Council of the Kilmallock Rural District, commanding the said Council, as sanitary authority of the said district, and, according to their duty and authority in that behalf, to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer for the said Kilmallock Rural District, under the title of Veterinary Inspector, with such duties and functions in aiding the administration of the sanitary laws within the said district, as have been assigned to him by the Local Government Board, and with such salary as the said Rural District Council should determine, with the approval of the Local Government Board, as directed by a sealed order of that Board, dated the 8th day of April, 1909.

On the 13th February, 1908, the Local Government Board, in pursuance of the power to make General and Special Orders vested in the Lord Lieutenant and Privy Council by section 34 of the Contagious Diseases Animals Act, 1878, and transferred to the Local Government Board by section 9 of the Contagious Diseases Animals Act, 1886, revoked all existing orders made in pursuance of the Contagious Diseases (Animals) Act of 1878,

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and made a new order called the "Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908" (1), for the purposes mentioned in section 34 of the Contagious Diseases (Animals) Act, 1878. The Contagious Diseases (Animals) Act, 1878 (2), section 34, as amended by section 9 of the Contagious Diseases (Animals) Act, 1886 (3), provided that "the Local Government Board may, from time to time, make such General or Special Orders as they think fit, subject and according to the provisions of this Act for the following purposes:—

"(ii.) For the inspection with the local authority of all persons carrying on the trade of cowkeepers, dairymen, or purveyors of milk.

"(iii.) For the inspection of cattle in dairies, and for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water-supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen.

"(iv.) For securing the cleanliness of milk-stores, milk shops, and milk-vessels used for containing milk for sale by such persons.

"(v.) For prescribing precautions to be taken for protecting milk against infection or contamination.

"(vi.) For authorizing a local authority to make regulations for the purposes aforesaid, or any of them, subject to such conditions, if any, as the Local Government Board prescribe."

By section 9 (sub-sect. 8) of the Contagious Diseases (Animals) Act, 1886, the expression "local authority" is defined as meaning an urban or rural sanitary authority within the meaning of the Public Health (Ireland) Act, 1878.

The Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908 (1), provided by articles 1 to 13 (inclusive) for the above purposes, and by article 24 gave power to the local authority to make regulations for the purposes mentioned in section 34 of the Act of 1878. Article 25 of the Order provided that "a local authority shall, from time to time, with our approval, appoint so many inspectors or other officers as may be necessary for the

(1) February 13, 1908; 1908, No. 164, Statutory Rules and Orders (hereinafter indicated by the abbreviation S. R. O.); (1908), p. 293; Dublin Gazette, February 19, 1908.

(2) 41 & 42 Vict. c. 74.

(3) 49 & 50 Vict. c. 32.

execution and enforcement of this Order, or of any regulations made by them in pursuance of the next preceding article, and shall pay to such inspectors and other officers such salaries or additional salaries as we may from time to time approve." Article 26 provided penalties for offences against the Order, and Article 27 that the Order should come into force in the district of every local authority in Ireland on and after the 1st May, 1908. The expression "local authority" was defined by Article 28 as meaning "the council of a rural district," "cowshed" as including "any dairy in which milking-cows may be kept," and "cowkeeper" as including "any person who keeps a cow or cows, and continuously, or regularly, or habitually, sells or supplies the milk of such cow or cows, or the butter fat contained in it to any person, creamery, or factory engaged in the making of butter, cheese, cream, or condensed milk," and "purveyor of milk" as including "any person whose business, or part of whose business, is the selling of milk, or who continuously or regularly, or habitually, sells milk."

On the 3rd April, 1908, the respondents, the Kilmallock District Council, held a meeting for the purpose of considering the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908, and having decided to take no action in connexion with the same, marked the order "read" on the minutes. On the 29th of the same month the Local Government Board wrote to the respondent, pointing out that the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908, was general in application, and that it was the duty of the council to arrange for the registration of cowkeepers, dairymen, and purveyors of milk, and to appoint the officers necessary for the execution of the provisions of the Order. The letter was received by the Council, and marked as "read" upon the minutes. On the 10th July following, Dr. Browne, Medical Inspector for the Local Government Board, attended at a meeting of the Council, and advised them to put the Order in force within their district. The Council refused to take any action in the matter. On the 1st August the Secretary of the Local Government Board wrote to the Council, stating that the Board, having had before them the minutes of the meeting of Council of 10th July preceding, regretted to observe that the

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Council had taken no action in the matter, and urged them to fulfil their duties in regard to the registration of dairymen, &c., and the appointment of officers under the Order, having regard to the large dairying industry carried on in their district. At a meeting held upon the 8th August the Council considered the above letter, and a proposal was made that the letter should be considered at the next meeting; but an amendment was proposed and carried that no order should be made on the letter, as the matter had been already considered. The Board, through their Secretary, again communicated with the Council on the 28th August, again urging them to reconsider their decision as to the Order, and quoting the opinion of Dr. Browne that the appointment of a special Inspector was especially necessary in a large dairying district such as Kilmallock. This letter was considered at a meeting of the Board held on the 4th September, and the following was entered on the minutes:—"The Council beg to inform the Local Government Board that the Kilmallock Rural District Council have already appointed five medical officers of health, five special sanitary officers, and a veterinary surgeon at a salary of £120 per annum, and that these officers discharge their duties to the entire satisfaction of the Council, and have, from time to time, reported on the sanitary condition of the houses, out-offices, cowsheds, and yards, within the Kilmallock Rural District; therefore, the Council cannot see the necessity of appointing additional officers. The Kilmallock Rural District is one of the most sanitary Rural Districts in Ireland." On receiving this notification the Board again wrote to the Council pointing out that they had no veterinary officer and had no power to appoint such officer, except under the provisions of the Dairies, Cowsheds and Milkshops Order, 1908, and again urging the Council to put that Order into effect. The letter was considered by the Council on the 16th October, and marked "read." The Local Government Board then directed Dr. Browne to make a detailed inspection and report of the premises used in connexion with the milk supply of the Kilmallock district. Dr. Browne's report, completed upon the 28th December, stated that the general condition of the cowsheds, generally, was unsatisfactory as regards construction, ventilation, light, drainage,

cubic space, and cleanliness, that there were many sheds coming fairly up to the standard in these matters, but that the drainage was as a rule defective, and that the milk was kept by retailers in uncovered cans, and liable to contamination by dust, &c. A detailed account of about forty cowsheds and premises was appended, and the report stated that it "appeared essential in the interests of public health, as well as of the creamery industry, that the provisions of the Dairies, Cowsheds, and Milkshops Order should be strictly enforced in the district, and that the appointment of officers possessing expert knowledge of diseases of dairy cattle was highly desirable and, in dairying districts, necessary." On the 21st January, 1909, the Local Government Board wrote to the Council, transmitting a copy of Dr. Browne's report, and pointing out that, as defects in the conditions of the milk supply had now been definitely brought before the Council, no reasonable ground remained for postponing the necessary action. At a meeting on the 22nd January, the Board's letter and Dr. Browne's report were considered, and the Council resolved that, as the condition of the district was excellent, they saw no reason for inflicting unnecessary expense upon the ratepayers. At a further meeting of the Council, held on the 5th February, a letter from Dr. Browne, stating that the complete administration of the Dairies, Cowsheds, and Milkshops Order required the appointment of a veterinary surgeon, a dairy inspector, and a registrar of dairies, and giving information as to the general salaries of these officers, was marked "read" on the minutes of the Council.

On the 3rd April, 1909, the Local Government Board issued the following sealed order under the provisions of the Public Health (Ireland) Act, 1898, section 11:—

No. 20,438.
1909.

"THE LOCAL GOVERNMENT BOARD FOR IRELAND.

"KILMALLOCK RURAL DISTRICT.

"WHEREAS it is provided by section eleven of the Public Health (Ireland) Act, 1878, that every Sanitary Authority shall appoint such sanitary officers as We, the Local Government Board for

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Ireland, shall in each case direct, with such salaries as the said Sanitary Authority shall determine with Our approval.

"Now, therefore, We, the Local Government Board for Ireland, in pursuance of the powers vested in Us by the said section, and of all other powers enabling Us in this behalf, do hereby order and direct the Rural District Council of the Kilmallock Rural District, being the Sanitary Authority of the said District, to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a Sanitary Officer for the said Kilmallock Rural District under the title of Veterinary Inspector, with such duties and functions in aiding the administration of the sanitary laws within the said district as We shall assign to him, and with such salary as the said Rural District Council shall determine with Our approval.

L. S.

"Given under Our Seal of Office, this Third day of April, in the Year of our Lord One Thousand Nine Hundred and Nine.

"(Signed),

"H. A. ROBINSON.
"T. J. STAFFORD."

On the 7th April, 1909, the Local Government Board wrote to the Council enclosing a copy of the sealed order, and informing the Council that if their duties under the Dairies, Cowsheds, and Milkshops (Ireland) Orders, 1908, were not forthwith carried out, the Board would have no alternative but to take legal proceedings. This letter, coming before the Council at their meeting held on the 11th April, was referred to the Council's solicitor for advice and information as to whether the Board could compel the Council to put the Order in force in their district. The letter was again under discussion at a meeting held on the 30th April, when it was resolved to call a special meeting at fourteen days' notice to consider the letter, and also the opinion of the law adviser as to the power of the Local Government Board to force the Council to put the Dairies Order in force. The special meeting was held upon the 14th of May, when the opinion of the Council's solicitor

that the Board had power to compel the Council was considered, and it was unanimously resolved that the Dairies Order should be put in force, and the necessary officers appointed. At the conclusion of the meeting a notice of motion was handed in by Mr. Bennett, a councillor not present at the previous meeting, protesting against the adoption of the Dairies, Cowsheds, and Milkshops Order (1908), when the consideration of the same was not on the agenda, and giving notice of motion to rescind the adoption of the Order at the next Council meeting. At the next meeting of the Council, held on the 28th May, Mr. Bennett's motion was carried, with six dissentients, and on the 9th June the Local Government Board wrote to the Council the following letter :—"The Local Government Board for Ireland have had before them the minutes of proceedings of the Kilmallock Rural District Council on the 28th ultimo, and they note that the Council by a majority have now rescinded their earlier resolution of the 14th ultimo, when it was decided to appoint officers, including a Veterinary Inspector, for the purpose of carrying out the provisions of the Dairies, Cowsheds, and Milkshops (Ireland) Order of 1908." The Board would, once more, impress upon the Rural District Council that that Order is mandatory, and applies to every district in Ireland without the preliminary formality of adoption by the local authority. Moreover, it is obligatory on the Kilmallock Rural District Council to comply with the directions of the Board's Order of the 3rd April, 1909, and appoint a Veterinary Inspector as a sanitary officer, whose duty it will be to examine cattle in dairies, to inspect dairies and cowsheds, and to report to the Council thereon. The Board, before placing the matter in the hands of their solicitors, desire to afford the Council a final opportunity of considering their position, but if, on or before the 1st proximo, the Council do not proceed to discharge their duties in regard to the supervision of the sources of the public milk supply, the Board will be compelled to institute proceedings for a mandamus."

This letter was considered by the Council at a meeting, held upon the 11th June, 1908, and the Council referred the Local Government Board to their minute of the 4th September, 1908, and further stated they had a Veterinary Inspector, whose duty

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extended to their district, and that, as no cases of tubercular disease were reported, and the cows were fed and milked under the most sanitary conditions, it would seem a great hardship to put in being a set of officers to perform non-existing duties. To this the Board replied by pointing out that the veterinary officer referred to was an officer of the County Council, under the Contagious Diseases of Animals Act, and, therefore, not paid by the District Council, and that he had no function under the Dairies, Cowsheds, and Milkshops Order, 1908, and the Board again requested the Council to comply with the order of the 3rd April, 1909.

On the 30th July, 1909, the Local Government Board, under the powers vested in them by section 11 of the Public Health (Ireland) Act, 1878, made a General Order called the "Sanitary (Veterinary Inspectors) Order, 1909," (1) providing regulations as to the duties and functions of veterinary inspectors. Article 2 of that Order provided that "the sanitary authority may, and when directed by us shall, appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer for the district under the title of Veterinary Inspector." Art. 3: "The sanitary authority shall pay to every officer appointed under this Order such salary as they shall determine with our approval." Art. 4, by fifteen sub-sections, provided the duties of the Veterinary Inspector, which included inspection of dairies and cowsheds, inspection as to registration of cow-keeping, &c., under the Dairies, Cowsheds, and Milkshops Order, 1908, advice on milk-supply, &c.

A copy of this General Order was sent to the Council on the 12th August, 1909. The consideration of the Order was adjourned from time to time, and on the 17th September was adjourned for the purpose of obtaining the advice of counsel. On the 18th December the Local Government Board wrote to the Council, calling attention to the delay, and referring them to the letters of the Board of the 7th April, 9th June, and 10th September, and enclosing copies of the Orders, and stating that the Board must finally call upon the Council to put the dairies in order. On the 7th January, 1910, at the Council's meeting, the letter of the

(1) July 3, 1909; 1909, No. 889. S. R. O.; (1909), p. 250.

Board was considered, and notices of motion were handed in that, on that day four weeks, the Council should take into consideration the advisability of putting the dairies into order and appointing officers. Senior counsel's opinion was handed to the Council by their solicitor. The consideration of the matter was adjourned from the 4th February, 1910, to the 18th February, and at the meeting on the latter date the Council ruled the motion, as to the adoption of the Dairies Order, as "not moved." On the 3rd March the Board wrote, stating that, in view of the persistent refusal of the Council to put the Order in force, the Board would have no alternative but to institute proceedings. This letter was considered by the Council at their meeting held on the 4th March, and it was then resolved that the matter should be considered at their next fortnightly meeting, and, at that meeting, held on the 18th March, the following resolution was passed with one dissentient: "We hereby repeat our conviction that it is unnecessary to adopt the Cowsheds Order, and we decline to inflict unnecessary expenses on the ratepayers of the district further than opening a register of vendors of milk." On the 9th April the Local Government Board wrote, acknowledging the receipt of this resolution, and stating that, having regard to the Council's refusal to comply with the sealed order of the 3rd April, 1909, the Board had put the matter in the hands of their solicitors with a view to proceedings for a mandamus.

On the 11th April, in pursuance of a direction by the Board, Dr. Browne made a supplemental report on the condition of the dairies and cowsheds in the Kilmallock district.

On the 5th May, 1910, the following letter was sent to the Council by the Secretary of the Local Government Board:—

"With reference to previous correspondence relative to the supervision of the milk supply in the Kilmallock Rural District, I am directed by the Local Government Board for Ireland to call upon the Council to comply with the requirements of the Board's order of the 3rd April, 1909, and to appoint a Veterinary Inspector for the performance of the duties prescribed in the Sanitary (Veterinary Inspectors) Order, 1909 (1). I am to add, in the

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event of default, this letter will be used in such proceedings as the Board may see fit to institute against the Rural District Council in regard to the matter."

At a meeting of the Council held on the 13th May, 1910, this letter was considered and marked "read."

The conditional order was obtained on the 8th June 1910, the motion being grounded on the affidavit of Mr. A. E. Barlas, Secretary to the Local Government Board, in which affidavit the facts, orders, and correspondence above mentioned were stated and referred to. On the 27th June, on motion by counsel on behalf of the Council, an extension of time for showing cause was obtained, and further extensions were granted on the 7th and 15th July. On the 20th July an affidavit showing cause, sworn by Mr. P. J. Coll, clerk to the Kilmallock Rural District Council, was filed, which, after referring to the Orders of the Local Government Board of the 3rd April, 1909, and 30th July, 1909, stated: "The said Council maintain the said Orders of the Local Government Board are *ultra vires* and unenforceable, that the Orders of April and July, 1909, constitute an attempt to legislate under the Public Health Act, 1878, in matters foreign to the scope of the said Act, and that the Acts of 1878 and 1886, under which the said Order purports to be made, do not enable the Local Government Board to legislate, as attempted, by the 24th Article of the said Order. The Council maintain that the attempt now being made by the Local Government Board to force them into the expenses contemplated, is unnecessary and oppressive, for the reasons set out time after time, in the said minutes of the said Council, and duly communicated from time to time to the Local Government Board."

At a meeting of the Council held on the 8th July, 1910, a resolution appointing Mr. Patrick J. Coll, Clerk of the Council, to be Registrar under the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908, was unanimously adopted, and on the 27th July the Local Government Board wrote to the Council, approving of the salary allowed to Mr. Coll, as such Registrar, but pointing out that "registration was of small utility unless supplemented by systematic and efficient inspection of dairy cows and dairy

premises." This letter was considered and marked "read" at the Council's meeting held on the 5th August, 1910.

The evidence before the King's Bench Division consisted of the affidavits of Mr. A. R. Barlas, Secretary to the Local Government Board, and of Mr. P. J. Coll, Clerk to the Kilmallock Council, and the foregoing correspondence, orders, and minutes, all of which, excepting the letter of the 27th July, 1910, and the minutes of the meetings held on the 8th July and 5th August, 1910, were stated, referred to, or exhibited in the affidavit of Mr. Barlas. From this affidavit the foregoing statement of facts has been compiled.

S. L. Brown, K.C. (with him *Ronan, K.C.*, and *Wylie*), for the Local Government Board, the prosecutors.

[Counsel referred to the Contagious Diseases (Animals) Act, 1878 (1), sect. 34; the Contagious Diseases (Animals) Act, 1886 (2), sect. 9; Vanston's Public Health, p. 637; the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908 (3).] The whole question is, whether this appointment should be made under section 11 of the Public Health (Ireland) Act, 1878 (4) (Local Government Board Sealed Order, 1909 (3rd April) (5)). *Rogers* v. *Guardians of Youghal Union* (6) is a decision on the meaning of "sanitary law": Dr. Browne's report shows that this is a matter of public health as distinct from "diseases of animals." The Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908 (3), is framed for carrying out the sanitary laws, and the appointment of a veterinary inspector is in aid of the administration of these laws. The Local Government Board were advised that Article 25 of the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908 (3), was probably *ultra vires*. [Palles, C.B.:—Where do you get power to provide for the qualification of the officer?] Under section 11 of the Public Health (Ireland) Act, 1878 (4).

(1) 41 & 42 Vict. c. 74.
(2) 49 & 50 Vict. c. 32.
(3) February 13, 1908; No. 164, S. R. O.; (1908), p. 293.
(4) 41 & 42 Vict. c. 52.
(5) 1909, No. 20, S. R. O.; (1909), p. 438.
(6) 16 L. R. Ir. 79.

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T. M. Healy, K.C., and *Fitzhenry* (with them *M. C. Burke*), for the Kilmallock Rural District Council, the respondents.

[Counsel referred to Vanston's Local Government, vol. i., p. 66; Local Government (Ireland) Act, 1898 (1), sect. 6*b*.] The Public Health (Ireland) Act, 1878 (2), is anterior to the Contagious Diseases (Animals) Act, 1878 (3). We have done all that is necessary as regards the appointment of a sanitary officer, Public Health (Ireland) Act, 1878 (2), sect. 11. This is the work of the County Council and not of the Rural District Council: Diseases of Animals Act, 1894 (4), sect. 69. The administration of these Animals Acts is now transferred to the Department of Agriculture: Vanston's Public Health, p. 1152; Agricultural and Technical Instruction (Ireland) Act, 1899 (5), s. 2 (1) (*a*). The Contagious Diseases (Animals) Act, 1878 (3), deals with "trade," or indoor dispute: here we have an attempt to apply that Act to farmers. Article 28 of the Dairies, Cow-sheds, and Milkshops (Ireland) Order, 1908 (6), extends the definition of "cow-keeper," and, therefore, extends the application of the Contagious Diseases (Animals) Act, 1878 (3): there is no jurisdiction to enable this extension. This is an attempt to enforce the Sanitary (Veterinary Inspectors) Order, 1909 (7). There is nothing in the Local Government (Ireland) Act (1) that transfers the powers under section 34 of the Contagious Diseases (Animals) Act, 1878 (3), to the District Councils.

Wylie, in reply:—

We seek to enforce the sealed order of the 3rd April, 1909, not the Sanitary (Veterinary Inspectors) Order, 1909 (7), or the Contagious Diseases (Animals) Acts (3). We wish to appoint an officer under section 11 of the Public Health (Ireland) Act, 1878 (2). There are two classes of duties and jurisdictions under

(1) 61 & 62 Vict. c. 37.
(2) 41 & 42 Vict. c. 52.
(3) *Ibid.*, c. 74.
(4) 57 & 58 Vict. c. 57.
(5) 62 & 63 Vict. c. 50.
(6) February 13, 1908; 1908, No. 164, S. R. O; (1908), p. 293.
(7) July 30, 1909; 1909, No. 889, S. R. O.; (1909), p. 250.

the Contagious Diseases (Animals) Act, 1878 (1)—(*a*) the prevention of disease in animals; and (*b*) the inspection of dairies, &c. Class (*b*) was transferred by section 9 of the Contagious Diseases (Animals) Act, 1886 (2), to the Local Government Board, but no power was given to appoint an inspector. Under sub-sections 1, 2, 3, and 8 of section 9, of the Contagious Diseases (Animals) Act, 1886 (2), the milk industry was brought into touch with the Public Health Code, and section 11 of the Public Health (Ireland) Act, 1878 (3). If in 1886 an inspector was appointed, his salary would have come out of the "general expenses," (Contagious Diseases (Animals) Act, 1886 (2)): "general expenses" are defined by section 232 of the Public Health (Ireland) Act, 1878 (3). The Contagious Diseases (Animals) Act, 1886 (2), makes the local authority the sanitary authority for the purpose of the Act. Up to 1894 the control of class (*a*), above mentioned, was in the Privy Council, and that of class (*b*) in the Local Government Board. Under section 6 of the Local Government (Ireland) Act, 1898 (4), class (*a*) was transferred to the County Councils: class (*b*) remained in the Local Government Board. The whole of the Contagious Diseases (Animals) Act, 1878 (1), except section 34, was repealed by the Diseases of Animals Act, 1894 (5). [Gibson, J.:—Does the power of appointing an inspector under section 81 of the Contagious Diseases (Animals) Act, 1878 (1), apply to the case of dairies?] There is no power under that sect. to appoint inspectors of dairies.

The question is, whether, if the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1908 (6), is illegal, or *ultra vires*, a mandamus should issue if it would lead to illegality. We ask for an order under section 11 of the Public Health (Ireland) Act, 1878 (3), as provided by the Board's sealed order of the 3rd April, 1909, "with such duties as we shall assign." If the mandamus issues, the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1902 (6), will be cancelled, and the duties will be carried out under section 34 of the Contagious Diseases (Animals) Act, 1878 (1).

(1) 41 & 42 Vict. c. 74.
(2) 49 & 50 Vict. c. 32.
(3) 41 & 42 Vict. c. 52.
(4) 61 & 62 Vict. c. 32.
(5) 67 & 58 Vict. c. 57.
(6) February 13, 1908; 1908, No. 164, S. O. R.; (1908), p. 293.

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The Diseases of Animals Act, 1894, does not incorporate sect. 34 of the Contagious Diseases (Animals) Act, 1878 (1), and sect. 34 of that Act has become part of the Public Health Code, and was transferred thereto in 1886 by itself without limitations or powers in aid. [Palles, C.B.:—How do you maintain that? Is not the power that which is given by the Contagious Diseases (Animals) Act, 1878? (1)] No; under section 9 (4) of the Contagious Diseases (Animals) Act, 1886 (2), powers conferred by the Public Health (Ireland) Act, 1878 (3), are given to officers and the expenses directed to be paid as under the Public Health (Ireland) Act. The schedule to the Diseases of Animals Act, 1894 (4), excludes section 34 of the Contagious Diseases (Animals) Act, 1878 (1), and section 9 of the Contagious Diseases (Animals) Act, 1886 (2); all other sections repealed by the schedule are codified. We have a power to insist upon a veterinary inspector similar to that given to the Board of Agriculture in England by section 35, sub-sect. 2, of the Diseases of Animals Act, 1894 (4).

Unless our contention is right, one code provides for the appointment of inspectors, another for the enforcement of inspections. The repealed section 42 of the Contagious Diseases (Animals) Act, 1878 (3), gave power in England to appoint veterinary inspectors. We do not seek to appoint a veterinary inspector, as such, but to appoint an officer who shall be qualified as a veterinary inspector.

Nov. 11

PALLES, C.B.:—

Several questions of importance and difficulty have been argued; but it is not necessary for me to express an opinion upon more than two of these. I, therefore, exclude from consideration the question whether the effect of section 9 of the Contagious Diseases (Animals) Act, 1886 (2), and of the Diseases of Animals Act, 1894 (4), has been to make section 34 of the Contagious Diseases (Animals) Act, 1878 (1), part of the code of Public Health in Ireland, so as to extend the duty of sanitary authorities under section 11 of the Public Health Act, 1878, to appoint sanitary

(1) 41 & 42 Vict. c. 74.
(2) 49 & 50 Vict. c. 32.
(3) 41 & 42 Vict. c. 52.
(4) 57 & 58 Vict. c. 57.

officers for the purposes mentioned in that 34th section of the 41 & 42 Vict. c. 74. For the purposes of my judgment I shall assume that this has been done; although, owing to the form of the Diseases of Animals Act, 1894 (1), there may be some difficulty in so deciding.

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The object of this application is to obtain a writ of mandamus to compel the Kilmallock Rural District Council, as sanitary authority of the district, to appoint a person as directed by a sealed order of the Local Government Board dated 3rd April, 1910, who is *registered under the Veterinary Surgeons Act*, 1881, to be a sanitary officer for the district, under the title of veterinary inspector, with such duties and functions, in aiding the administration of the sanitary laws within the district, as may be assigned to him by the Local Government Board.

I desire to emphasize the fact that it is impossible to comply with that order of the 3rd April last, unless the person appointed inspector be a veterinary surgeon, as my judgment depends on the solution of the question whether the Local Government Board has a right to insist that the appointee shall have this qualification.

On the 13th February, 1908, the Local Government Board made an Order for the purposes specified in section 34 of the Contagious Diseases (Animals) Act, 1878, and by Article 25 of the Order directed that local authorities should from time to time, with the approval of the Local Government Board, appoint so many inspectors or other officers as may be necessary for the execution and enforcement of this Order, or of any regulations in pursuance of it. With reference to this Order I shall say no more than that, were it necessary for me to do so, I should probably hold that it was *ultra vires* for two reasons, first, because the section in question does not confer any power to require the appointment of such officers, and secondly, because, in my opinion, it attempts to unduly extend the class of persons described in section 34 of 41 & 42 Vict. c. 74, as "persons carrying on the trade of cow-keepers, dairymen, or purveyors of milk."

After this Order was made the Local Government Board made

(1) 57 & 58 Vict. c. 57

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the sealed order, now sought to be enforced, directing the Rural District Council of Kilmallock to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer for that district under the title of Veterinary Inspector.

The main ground upon which I hold that mandamus to enforce this order cannot go is such that it is unnecessary for me to make any further reference to the General Order of 13th February, 1908.

I commence then with two Acts, both passed in the year 1878, the Public Health (Ireland) Act, 1878 (1), and the Contagious Diseases (Animals) Act, 1878 (2). They are the origin of two different codes, the objects of which are in the main distinct, although possibly one of them may, to some extent, overlap the other, but undoubtedly the purposes of the 34th section of the Contagious Diseases (Animals) Act, 1878, are not included in those of the Public Health Act, 1878.

Section 11 of the latter Act enacts that "every sanitary authority, whether urban or rural"—which expression includes the Kilmallock Rural District Council—"shall appoint such other sanitary officers" (*i.e.* officers other than medical officers of health, including a medical superintendent officer of health when deemed necessary) "as the Local Government Board shall in each case direct, with such salaries or additional salaries as the said sanitary authority shall determine, with the approval of the Local Government Board; and that the Board shall assign to the sanitary officers so appointed their respective duties and functions in the discovery, or inspection, or removal of nuisances, in the supply of pure water, in the making or repairing of sewers and drains, or in generally aiding the administration of the *sanitary laws* within the district."

As there is nothing known to the common law as sanitary laws, except the principles which relate to public nuisances, injurious to health, and as such nuisances are some of the subjects of this Public Health Act, I think that the only laws pointed at by this expression "sanitary laws" are the statutes relating to Public Health. The section later on enacts:—"That

(1) 41 & 42 Vict. c. 52. (2) *Ibid.*, c. 74.

the Local Government Board shall have the same powers with regard to the qualification, appointment, duties, regulation of salary, and tenure of office of every sanitary officer, as they have in the case of the medical officers of a dispensary district." The section thus empowers the Local Government Board to define such qualifications for such officers as may be necessary for the purposes of the Act, and they rely upon this power as one entitling them to insist that inspectors appointed by them for the purposes of section 34 of the Contagious Diseases (Animals) Act, 1878 (1), shall be persons registered under the Veterinary Surgeons Act, 1881.

I now turn to the Contagious Diseases (Animals) Act, 1878 (1), and I find that such of its provisions as require the appointment by local authorities of veterinary inspectors apply only to England.

Section 42, sub-section 2, which is contained in Part II of that Act, enacts that every local authority shall keep appointed at all times at least one veterinary inspector . . . , but the application to Ireland of that Part II is effected by Part IV, section 75 (2), which is in the following words :—

" Part II shall also, by virtue of this section, extend to Ireland, subject to Part IV, which shall have effect in substitution for Part II, when so expressed or implied, and otherwise shall have effect in addition to Part II."

Part IV is thus the primary enactment as regards Ireland, and controls Part II, so far as there be any conflict between the two parts of the statute. Now, section 81 (1), which is in Part IV, enacts that " the provisions of Part II, requiring local authorities to keep appointed veterinary inspectors, shall not extend to Ireland ; and the powers and duties by Part II conferred and imposed on a veterinary inspector shall in Ireland be vested in and discharged by an inspector ; but where a person appointed to be an inspector in Ireland has the qualification of a veterinary inspector under this Act, he may be styled a veterinary inspector." Sub-section 2 authorizes the appointment of a veterinary inspector

(1) 41 & 42 Vict. c. 74.

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for a "united district"; but, as the Kilmallock district does not belong to that class, that sub-section has no bearing on this case.

I now turn to section 34, which is in Part II of the Act, which empowers the Privy Council, from time to time, to make such general or special orders as they think fit, subject and according to the provisions of the Act, for the purposes stated therein—which may be stated to be for the registration of persons carrying on the trade of cow-keepers, dairymen, or purveyors of milk; for the inspection of cattle in dairies, for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water-supply of dairies and cowsheds in the occupation of persons following the trade of cow-keepers or dairymen; for securing the cleanliness of milk-stores, and of milk-vessels used for containing milk for sale by such persons; for prescribing precautions to be taken for protecting milk against infection or contamination; for authorizing a local authority to make regulations for the purposes aforesaid, or any of them, subject to such conditions, if any, as the Privy Council prescribe."

The history of the legislation contained in this enactment is a curious one. The powers given by it were, so far as Ireland is concerned, transferred to the Local Government Board by section 9 of the Contagious Diseases (Animals) Act, 1886 (1); and, when the Contagious Diseases (Animals) Acts were consolidated by the Diseases of Animals Act, 1894 (2), the whole of the Contagious Diseases (Animals) Act, 1878 (3), was repealed, except section 34; as was also the whole of the Contagious Diseases (Animals) Act, 1886 (1), except section 9. Counsel for the Local Government Board contend, and I think rightly, that the effect of this has been to exclude these two sections from the Diseases of Animals Code, as consolidated by the Act of 1894. But, assuming this to be correct, it is necessary to consider the powers which the Local Government Board have under section 34. What are they? I think it quite clear that the powers transferred to the Local Government Board by section 9 of the Act of 1886, were the powers theretofore vested in the Privy Council under

(1) 49 & 50 Vict. c. 32. (2) 57 & 58 Vict. c. 57.
(3) 41 & 42 Vict. c. 74.

section 34 of the Contagious Diseases (Animals) Act, 1878; and that these powers, when so transferred, were limited when vested in the Local Government Board in the same manner as they were limited when exercisable by the Privy Council, by the express provisions of the 81st section. Consequently, a local authority could not be coerced by any exercise of that power (as the order of the 3rd April, 1910, sought to be enforced here, seeks to coerce them) to appoint a veterinary inspector. Mr. Wylie relied on sub-section 4 of section 9 of the Act of 1886, as showing that the powers of the Local Government Board, under section 34, were intended to be more extensive than those which the Privy Council formerly had; but I cannot agree with that contention. That sub-section enacts that "the local authority and their officers, for the purpose of enforcing *the said orders*, and any regulations made thereunder, shall have" certain rights and ancillary powers; but these powers are, by the very words of the sub-section, so given for the purpose of enforcing "the *said* orders," viz., orders within the powers formerly vested in the Privy Council, and by that Act transferred to the Local Government Board. It was not intended that the Board's power to make orders for enforcing section 34 should be more extensive than that previously possessed by the Privy Council.

I now return to section 34. I am clearly of opinion that, when enacted, it was controlled as regards its application to Ireland, by section 81 of the same Act; and that, therefore, the Lord Lieutenant in Council never had power to make an order directing that inspections under section 34 (ii) should be carried out by a veterinary inspector. The local authority could, if they chose, appoint a veterinary inspector; but the Lord Lieutenant in Council had no power to compel them to do so. We are, however, now asked to hold that section 9 of the Contagious Diseases (Animals) Act, 1886, not only transferred to the Local Government Board the powers conferred by section 34, but that section 34 is not now in any way controlled or modified by the provisions of section 81—a section which formed part of the same Act as section 34, and which, though repealed by the Diseases of Animals Act, 1894, was re-enacted by section 69. I am clearly of opinion that we cannot do so. When an Act is repealed in part, it is

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settled that in construing the unrepealed provision the Court must look to the scope and meaning which it had as part of the Act prior to the repeal, unless the repealing statute shows an intention to free the unrepealed sections from such restrictions or modifications as were imposed upon them by the repealed sections. No such intention is to be found in the Diseases of Animals Act, 1894, with regard either to section 34 of the Act of 1878, or section 9 of the Act of 1886. I am therefore of opinion that the Local Government Board has no power to insist that inspections under section 34 shall be carried out by veterinary inspectors.

Now, what have the Local Government Board done in this case? It is true that by their sealed order they do not, in words, profess to order the appointment of a veterinary inspector for the purposes of section 34; but it is quite plain that the appointment is to be made for these purposes. The contention of the Board is that, in ordering this appointment to be made, they are acting under the powers given them by section 11 of the Public Health Act, 1878, which enables them to prescribe the qualifications of the appointee; and they insist that in this case the inspector shall be registered under the Veterinary Surgeons Act, 1881, in order to perform duties for which in Ireland the appointment of a veterinary inspector is not obligatory.

I now return to the consideration of section 11 of the Public Health (Ireland) Act, 1878 (1). I treat it as part of the legislation of the year, and as being enacted to ensure that the persons appointed to carry out the provisions of that Act should be properly qualified for doing so. I hold that the purposes of section 34 of the Contagious Diseases (Animals) Act, 1878, extend beyond those which section 11 of the Public Health (Ireland) Act, 1878, is intended to serve; and I also hold that the Local Government Board are using section 11 in order to compel the Kilmallock Rural District Council to do that which, by the Contagious Diseases (Animals) Act, 1878, they are relieved from doing.

If it were necessary for me to do so, I should hold that the Local Government Board are seeking to use powers given them by one Act, and for one set of purposes, as a means of enforcing the

(1) 41 & 42 Vict. c. 52.

powers given them by another Act and for a different purpose, and I should refuse to lend the aid of the Court to such a proceeding.

GIBSON, J.:—

I concur with my Lord; like him, expressing no opinion on section 6 of the Local Government Act, 1898, or on the effect of the Consolidating Diseases Act of 1894. Counsel for the Board contend that section 34 of the Contagious Diseases Act, 1878, was by the subsequent legislation taken out of the Diseases Code proper and put into or left as part of the Public Health Act, while Mr. Healy for the Rural District Council argues that sect. 34, being part of the contagious diseases enactment, is thrown forward into and consolidated with the Diseases Act, 1894; see section 78. His construction is recommended by convenience. The expenses of officers under each set of Acts come out of the poor rate, and it is not easy to see any sound reason why there should be separate officers to perform the respective duties imposed by section 34 and by the Diseases Act, 1894, with separate salaries and appointed by different bodies. One would have expected that if the Legislature had intended to make section 34 part of the Public Health Act with such results, it would have expressed its meaning in direct terms and not left it to be collected by doubtful inference. The Diseases Act, however, appears in its own provisions special, notwithstanding such sections as sections 71 and 75.

I think the application must be refused on two grounds.

The Public Health Act is directly and primarily conversant with human health. The Contagious Diseases (Animals) Acts, though mainly directed to secure the same object, represent separate special legislation. The special enactments as to veterinary inspectors in section 81 of the Act of 1878, continued in the Diseases Act, 1894, make it difficult to suppose that it was intended at any time to vest in the Local Government Board the right to require the appointment of inspectors with a necessary veterinary qualification. Such qualification would obviously be more essential for cattle diseases proper than for dairy inspection, yet in the case of such diseases, the veterinary qualification is expressly declared not to be necessary. The Order before us avoids describing the

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officer as a veterinary inspector, and uses the general description in section 11 of the Public Health Act, 1878, but the form of expression cannot alter the substance of what is intended, which is avowedly dairy inspection under section 34, and counsel argued that the necessity of veterinary inspection for that purpose was established by the report read to us. In my opinion, if the Local Government Board can direct the district council to appoint inspectors for dairy purposes at all, it cannot attach a veterinary qualification as an indispensable requisite.

The second objection is founded on the Davies Order of 1908 now in force, which prescribes the duties which the veterinary officer, when appointed, will have to discharge. The order is not confined to the trade or business of dairying, and seems to me largely to be *ultra vires*. A letter of the Vice-President was read to us stating that if the mandamus was granted, the definition in the Order, if considered open to objection, would be withdrawn. Even without the definition, many of the articles seem in excess of authority. I think the Court must take the Order which is uncancelled and unamended as now defining the duties which the veterinary officer will be required to perform—duties which are far beyond what is legal, and which from their extensive and laborious character would require high remuneration. It is not reasonable that the District Council should be compelled to appoint an officer to perform such duties and at such pay. If the Order was withdrawn, this objection would be removed, but mandamus cannot be awarded conditionally and hypothetically; while the Order stands, it seems to me that, at least as a matter of discretion, it constitutes an objection to this application.

BOYD, J., concurred.

C. N. K.

The Local Government Board appealed (1).

Ronan, K.C., and *S. L. Brown, K.C.* (with them *Wylie*), for the appellants.

Pigot, K.C., and *Fitzhenry* (with them *M. C. Burke*), for the respondents.

The arguments were to the same effect as in the King's Bench Division.

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Dec. 13.

THE LORD CHANCELLOR:— Dec. 21.

The object of this appeal is to have reversed an order of the King's Bench, dated 11th November, 1910, allowing the cause shown against a conditional order for a writ of mandamus, dated 8th June, 1910, and to have that conditional order for a writ of mandamus made absolute notwithstanding such cause shown.

The order sought to be enforced is one dated 3rd April, 1909, made by the Local Government Board under the recited powers of the 11th sect. of the Public Health (Ireland) Act, 1878, ordering and directing the Rural District Council of the Kilmallock Rural District as the sanitary authority of such district to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer for the defendant authority under the title of Veterinary Inspector, with such duties and functions in aiding the administration of the sanitary laws within the said district as the Board should assign to him, and with such salary as the said Rural District should determine with the Board's approval.

I have had the advantage of reading the elaborate written judgment of my brother Lord Justice Holmes, and also one of my brother Lord Justice Cherry, and I entirely concur in the result of these judgments to which I could hardly hope to add anything useful. I was greatly struck by the considered admission of the respondents' counsel that after the changes made by the Legislature in the Contagious Diseases (Animals) Acts and Public Health Acts, and taking those Acts as they now stand, dealing with the closely allied subject-matter of public health and inspections of food, including especially milk, there was no mode of appointing

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officers needed as here save by resorting to the provisions of the 11th section of the Public Health Act.

I may add that I take the same view as Lord Justice Holmes with regard to the validity of the order of the Local Government Board of 1908.

I am of opinion that the judgment of the King's Bench Division must be reversed, and the conditional order for a writ of mandamus made absolute with costs.

HOLMES, L.J.:—

The question discussed in this case is the validity of a sealed order of the 3rd April, 1909, of the Local Government Board directing the Rural District Council of Kilmallock to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer for their district, with such duties and functions in aiding the administration of the sanitary laws therein as the Board would assign to him, and with such salary as the District Council with the approval of the Board would determine.

Several questions were argued here and in the King's Bench Division on which that Court gave no final decision. The Lord Chief Baron's judgment turned on whether the Local Government Board had authority to direct that the person to be appointed should be a registered veterinary surgeon; and, having held that the Board had no such power, he was relieved from determining the other matters argued. Gibson, J., while making this one ground of his decision, adds another, founded on the Dairies, Cowsheds, and Milkshops Order, 1908, which he held, and, in my opinion, rightly held, to be the foundation of the sealed order of April, 1909. Although the latter contains no reference to the former, I am satisfied, from the correspondence and the admitted facts, that the object of the Local Government Board in issuing its sealed order to the Kilmallock Rural Council was that there should be an officer to see that the provisions of the General Order of 1908 were carried into execution; and if I were of opinion, as Gibson, J., was, that the last-mentioned order was *ultra vires*, I should hold this to be sufficient cause against issuing the writ of mandamus sought for by the appellants. The principal source

of the authority exercised by the Local Government Board in sanitary matters is the Public Health (Ireland) Act, 1878, which divides the county into sanitary districts, creating a local authority in each district, and conferring on the Board certain functions or duties in relation thereto. One of these is the power, given by section 11, to direct every local authority to appoint, in addition to the medical officer of a dispensary district, such other sanitary officers as may be deemed necessary, and to assign to them their respective duties and functions in the discovery or inspection or removal of nuisances, in the supply of pure water, in the making and repairing of sewers and drains, or in generally aiding the administration of the sanitary laws within the district. The section further provides that the Board shall have the same powers with regard to the qualification of every sanitary officer as they have in the case of a medical officer of a dispensary district. The sealed order of April, 1909, purports to be made pursuant to the power thus conferred; but as the validity of this order is so closely connected with the General Order respecting dairies, cowsheds, and milkshops of the previous year, I prefer to begin by considering the latter.

As the law stood after the Public Health (Ireland) Act was passed, the Local Government Board was not empowered to make a General Order of this kind. Not only was there no provision in that statute giving the Board such power, but the Contagious Diseases (Animals) Act, 1878, that became law a few days later, by its 34th section, enabled the Privy Council from time to time to make such General or Special Orders as they think fit for several purposes carefully enumerated relative to dairies, cowsheds, and milkshops. Therefore, there is no difficulty in answering Mr. Fitzhenry's question put repeatedly to the Court: What would be our decision if the General Order of 1908 and the sealed order of 1909 had been made by the Board in 1878 and 1879? If it were possible to conceive an administrative department guilty of such folly, both would be invalid. It would probably occur to most men reading section 34 that the orders to be made thereunder would be much more akin to considerations of public health than to contagious diseases of animals. For example, an order securing the cleanliness of milk-stores, milkshops, and milk-

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vessels used for containing milk for sale, or prescribing precautions to be taken for protecting milk against infection or contamination, would relate most closely to public health, and very remotely, if at all, to the contagious diseases of animals. The same observation, in a modified degree, applies to the other purposes for which orders may be made under the section. It might occur to an outside critic that the section had got into the wrong Act; and this view is strongly confirmed by subsequent legislation. In 1886 an Act was passed to amend the Contagious Diseases (Animals) Act, 1878, one of the objects of which was, in my opinion, to transfer section 34 from the code relating to the diseases of animals to the code relating to public health. That Act, like the Act of 1878, amended thereby, applies to the Three Kingdoms; but I confine myself to the part of it that relates to Ireland, with the observation that such part is quite in harmony with the parts dealing with England and Scotland. By section 9, sub-section 8, the powers vested in the Privy Council of making general or special orders under section 34 for the purposes therein mentioned are transferred to the Local Government Board, while the local authorities for carrying out this section, which, under the statute of 1878, were the boards of guardians of the several poor law unions, become the urban or rural sanitary authorities within the meaning of the Public Health (Ireland) Act, 1878.

I hold that the effect of this legislation was to make section 34 part of the sanitary laws referred to in section 11 of the Public Health Act of 1878, and to enable the Local Government Board under that section to direct the appointment of an officer or officers in a sanitary district to aid in the administration of orders made under that section, provided such orders are not in excess of the powers conferred thereby. This leads me to consider whether the General Order of 1908 exceeds these powers.

The Lord Chief Baron said that if it were necessary for him to do so, he would probably hold that the Order was *ultra vires* because section 34 does not confer any power to require the appointment of officers, and also because it extends the class of persons described in the section as carrying on the trade of cow-keepers, dairymen, or purveyors of milk. These seem also to be the objections of Mr. Justice Gibson to the Order, although he

does not state them so specifically; and Mr. Pigot, counsel for the respondents, expressly confined his objections to Article 25, relating to the appointment of officers by the local authority and to the definition of "cow-keeper." It is not necessary for me to determine whether section 34 in itself enables the Board to direct the local authorities to appoint inspectors, as if I am right in holding that the effect of the subsequent legislation is to make section 34 part of the sanitary laws within the meaning of section 11 of the Public Health Act, I am of opinion that the Board is authorized by section 11 to give the direction contained in Article 25. Whether the definition of "cow-keeper" is *ultra vires* or not depends upon its meaning in section 34. The Board cannot by a definition extend that term to persons who would not otherwise be within it; but I see no objection to the Order defining or explaining it according to its true legal interpretation. If I were called on in this Court to describe who are cow-keepers within the meaning of the section, I could not do so as well and clearly as it is done in Article 28 of the Order. It expresses, in my opinion, accurately and precisely what is meant by the word, having regard to the connexion in which it occurs.

The objection taken to it by Mr. Pigot is, that it includes farmers, and he refers to the Irish Bankrupt and Insolvent Act, 1857, passed for a wholly different purpose, the language of which shows that the word "cow-keeper" therein does not extend to farmers. But in this statute there is no such language, and bearing in mind the sanitary purposes contemplated by the provision, its object would be defeated if a more limited meaning was given to "cow-keeper."

There remains the other question on which the judgment of the Divisional Court depends—whether the Board in its sealed order had a right to direct that the person to be appointed should be a qualified veterinary surgeon. Prior to the passing of the Diseases of Animals Act, 1894, this would have caused me much difficulty, and I cannot say how I would have decided it. Section 81 of the Contagious Diseases (Animals) Act, 1878, enacts that the provisions requiring local authorities in England to keep appointed veterinary inspectors shall not extend to Ireland, and in effect provides that Irish inspectors need not be

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veterinary surgeons. Although I am of opinion that the effect of the statute of 1886 was to transfer section 34 to the sanitary code, and to make section 11 of the Public Health (Ir.) Act, 1878, applicable thereto, I am not sure that the powers given thereby to the Local Government Board to prescribe the qualification of sanitary officers were not limited by section 81 so as to prevent the Board requiring a veterinary qualification. I am disposed to think that their powers were not so limited; but this difficulty, if it existed, was removed by the Act of 1894, which I have already mentioned. That statute repeals the whole of the Contagious Diseases (Animals) Act, 1878, except section 34, and of the Contagious Diseases (Animals) Act, 1886, except section 9, being the section transferring the administration of section 34 to the Local Government Board and the local sanitary authorities. This clearly conveys to my mind that these provisions have become and are to continue portion of the sanitary code as distinguished from that relating to the contagious diseases of animals, and to be thereafter free from and unaffected by anything contained in the statutes relating thereto. No doubt section 81 of the Act of 1878 having been thus repealed is re-enacted by section 69 of the Act of 1894; but this re-enactment is, in my opinion, for the purposes of the new statutes, and cannot affect the provisions of other statutes not connected therewith. For these reasons I hold both the General Order of 1908 and the sealed order of 1909 legal.

Much has been said during the argument about the unreasonable character of the veterinary qualification of an inspector. We are told that the duties could be equally well performed by a person in a humbler position, and that prescribing this qualification will cause unnecessary expense to the local authority. I admit that an order of this kind may impose a qualification so opposed to the ideas of ordinary men as to afford a sufficient ground for not enforcing it by writ of mandamus. But there is no evidence of this in the present case. Veterinary surgeons seem to me to be well suited for the work, which would take only a portion of their time; and as their professional income in this country is comparatively small, there would be, I think, no difficulty in procuring their services at a very moderate salary. This is a matter of which I know little myself, but I attach importance to the fact

that one hundred and fifty-six local authorities, by whom the salaries are paid, have acted on similar orders without demur or hesitation: and that objection has been taken by very few. Holding the sealed order of 1909 to be valid, I am of opinion that obedience to it ought to be enforced by writ of mandamus.

CHERRY, L.J.:—

The writ of mandamus in this case was refused, as I understand the judgments, in the Court below, upon two grounds—

(1) That the powers transferred to the Local Government Board by section 9 of the Act of 1886 (1) were the powers previously vested in the Privy Council under section 34 of the Contagious Diseases (Animals) Act, 1878 (2), and that those powers, when so transferred, were limited when vested in the Local Government Board in the same manner as they had been previously limited by the express provisions of the 81st section of the latter Act (2), so that it was not competent for the Local Government Board to require that an inspector appointed by the local authority should have a veterinary qualification, except in the case of two or more poor law unions being united as provided for by the 2nd sub-section of section 81; and

(2) That inasmuch as the duty which the proposed inspector was to be required to perform was manifestly to enforce the provisions of the General Order with respect to dairies, cowsheds, and milkshops, made by the Local Government Board on the 13th of February, 1908, which Order was, in the opinion of the Court, in many respects, *ultra vires*, the writ of mandamus, if granted, would be used to enforce an illegal Order.

The first of these grounds is that principally relied upon by Palles, C.B., in his judgment, while Gibson, J., appears to me to attach more importance to the second.

As regards the first ground, I think the plain answer to it is that the 81st section of the Contagious Diseases (Animals) Act, 1878 (2), has been repealed by the Act of 1894. It is true that it is re-enacted by the 69th section of the latter Act (3), but not with

(1) 49 & 50 Vict. c. 32. (2) 41 & 42 Vict. c. 74.
(3) 57 & 58 Vict. c. 57.

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reference to the 34th section of the Act of 1878 (1), which has been left standing alone, outside the provisions of the Diseases of Animals Act altogether. The duties under the 34th section have been transferred by the 9th section of the Act of 1886 (2) to the "urban or rural sanitary authority within the meaning of the Public Health Act, 1878" (3) (sub-section 8), under the supervision of the Local Government Board (sub-section 1). Neither of these authorities has anything to do with enforcing the provisions of the Diseases of Animals Act, 1894 (4); and, in my opinion, the plain object of this transfer of jurisdiction, and of the repeal and re-enactment of the 81st section of the earlier Act (1) by the Act of 1894 (4), was to free the provisions of section 34 of the former Act (1), as to dairies, cowsheds, and milkshops, from the restrictions contained in the Diseases of Animals Acts, and bring them within the provisions of the Public Health Acts, with which they are far more intimately connected. If this be so, as I think it is, it is plain that the Legislature intended the powers both of the local authority and of the Local Government Board, with regard to dairies, cowsheds, and milkshops, to be exercised under the provisions of the Public Health Acts, and not under those of the Diseases of Animals Acts.

Apart from the argument based upon the provisions of the Diseases of Animals Acts, there is nothing, as far as I can see, on the face of the order of the Local Government Board of 3rd April, 1909, which can be suggested to be *ultra vires*. It purports to be made under the powers conferred by section 11 of the Public Health (Ireland) Act, 1878 (3); and it does not contain any direction, or requisition, to the district council which is not clearly warranted by the express terms of that section—assuming, of course, that the proposed inspector would be a "sanitary officer," and that the 34th section of the Diseases of Animals Act, 1878 (1), standing now alone, as it does (the rest of the Act having been repealed), is a "sanitary law." The word "sanitary" means "connected with health." It is derived from the Latin words "sanitas" = "health," and "sanus" = "sound."

(1) 41 & 42 Vict. c. 74.
(2) 49 & 50 Vict. c. 32.
(3) 41 & 42 Vict. c. 52.
(4) 57 & 58 Vict. c. 57.

Can anything be more intimately "connected with health" than regulations for protecting milk from infection or contamination? The term "Sanitary Laws," too, has always received a wide interpretation. It is not limited to "Sanitary *Acts*," as defined by section 2 of the Public Health Act, 1878. It has been held in *Rogers* v. *Guardians of Youghal Union* (1) to apply to the Labourers Acts. It was suggested by Mr. Pigot that it only comprised Acts of Parliament in force at the passing of the Public Health Act, 1878; but that would be a most unreasonable limitation, and quite contrary to the interpretation adopted by the Lord Chief Baron in *Rogers* v. *Guardians of Youghal Union*. "I cannot entertain any doubt," says he (2), "that the expression 'sanitary laws,' in the 11th section, means sanitary laws from time to time, and from the passing of the Act of 1878 (41 & 42 Vict. c. 52) included."

For these reasons I am of opinion that the Local Government Board had jurisdiction under the 11th section of the Public Health Act, 1878 (3), to make the order of the 3rd of April, 1909; and that their powers in this respect were not in any way restricted by the provisions, whether repealed or unrepealed, of the Diseases of Animals Acts.

Upon the second ground of appeal, namely, the alleged *ultra vires* character of some of the provisions of the General Order of February 13th, 1908, which was relied upon chiefly by Gibson, J., I do not think it necessary to say much, as I cannot see how it arises in the present case. There is no reference whatsoever in the order of 3rd April, 1909, to this General Order; and I am not prepared to assume that the Local Government Board, in prescribing duties for the new inspector, will give him any directions which are beyond their powers to give. If there is anything *ultra vires* in the General Order of 13th of February, 1908, I am sure that the Local Government Board will take steps to amend it, so as to make it in all respects within their jurisdiction. As at present advised, I cannot see that there is anything *ultra vires* in that Order. But if there is, and if no steps are taken to alter it

(1) 16 L. R. Ir. 79. (2) *Ibid.*, at p. 86.
(3) 41 & 42 Vict. c. 52.

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by the Board, it will be open to anyone prejudicially affected to raise the question of its validity. Our decision, in this case, does not in any way prevent this being done. All that we decide is, that the Board had power to make the order of 3rd April, 1909, which does not directly, or indirectly, refer to the General Order of 13th February, 1908.

For these reasons I am of opinion that the decision of the King's Bench Division should be reversed, and that the conditional order for a mandamus should be made absolute.

Solicitors for the Local Government Board: *T. T. Macredy & Son.*

Solicitor for the Kilmallock Rural District Council: *J. J. Power.*

W. G.

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ELIZABETH MURPHY (CONTINUED IN THE NAME OF JOHN MURPHY, ADMINISTRATOR OF ELIZABETH MURPHY, DECEASED), SUPPLIANT, *v.* THE KING (1).

Old Age Pension—Decision of local pension committee—Statutory conditions—Jurisdiction—"Final and conclusive"—Old Age Pensions Act, 1908, 8 *Edw.* 7, *c.* 40.

An applicant for an old age pension who had not, in fact, attained the age of seventy, was awarded a pension by the local pension committee, and no appeal against the award was brought in the manner prescribed by the Act. Subsequently new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a "question," in the manner provided by the Act, with reference to the pension, to the effect that the pensioner was not entitled to receive a pension, as she had not attained the age of seventy, and on the local pension committee deciding to continue the pension, the pension officer appealed to the Local Government Board in the manner prescribed by the Act, whereupon the Board deprived the pensioner of her pension.

On the hearing of a petition of right brought by the pensioner—

Held, that the original decision of the local pension committee was invalid, as the applicant had not fulfilled the statutory condition as to age, and that, notwithstanding sect. 7 (2) of the Act, which enacts that "the decision of the

(1) Before THE LORD CHANCELLOR, and HOLMES and CHERRY, LJJ

local pension committee on any claim or question which is not referred to the central pension authority . . . shall be final and conclusive," it was competent for the pension officer to raise the said question, and for the Local Government Board to deprive the pensioner of the pension on the ground of her age.

APPEAL by the personal representative of the suppliant from the judgment of the King's Bench Division.

The petition of right presented by Elizabeth Murphy of Grahormack, county Wexford, contained the following averments :—

1. The suppliant, on or about the 26th day of October, 1908. duly made a claim for an old age pension under the Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), and Regulation 6 of the Treasury Regulations, dated 20th August, 1908, made under section 10 (1) of that Act.

2. The suppliant's claim was duly referred, under section 7 (1) of the said Act, to the local pension committee of the county Wexford, appointed under the provisions of section 8 (1) of said Act, and Regulation 36 of the said Treasury Regulations, and the said committee, pursuant to section 8 (2) of the said Act, delegated to a sub-committee duly appointed by it, and known as the No. 1 sub-committee of the local pension committee of the county of Wexford, its powers and duties under the said Act, and the suppliant's claim was referred under the provisions of section 7 (1*a*) by the said committee or sub-committee, or both, for report and inquiry to the pension officer appointed by the Treasury under section 8 (4) of the said Act for the area of the county of Wexford in which the suppliant resided.

3. The said pension officer duly inquired under the provisions of section 7 (1*b*) of said Act, and in accordance with Regulation 9 of the said Treasury Regulations, into, and reported under the said section and sub-section, and in accordance with Regulation 10 of the said Treasury Regulations, upon the claim of the suppliant, and the said local pension committee or sub-committee, or both, on receipt of said report, and after receiving from said pension officer all necessary information as to the said claim, as prescribed by section 7 (1*b*), and Regulations 11 and 12 of the said Treasury Regulations, considered the case of the suppliant,

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and the pension officer having reported that the said claim might be properly allowed, gave their decision thereon, and decided that the suppliant was entitled to an old age pension of five shillings per week, the rate of pension applicable to said case under section 1 and the schedule to the said Act. No appeal was at the time had or brought in the manner prescribed by section 7 (1*c*) of the said Act, or in any manner in respect of said decision.

4. The suppliant duly entered into receipt of a pension of five shillings per week on or about the first day of January, 1909.

5. The said local pension committee or sub-committee on or about the 30th day of April, 1909, purported to re-investigate the suppliant's case, and to give another decision thereon confirming that originally given by them as set forth in paragraph 3, and subsequently, on the 18th day of May, 1909, the Local Government Board for Ireland purported to hear an appeal from said order, and to decide that the suppliant was not entitled to a pension under the Act, on the ground that she was not of the statutory age of seventy.

6. The suppliant received a notice, dated the 21st day of May, 1909, from the clerk of said sub-committee, stating that it had been determined that the suppliant was not entitled to any pension, and same was disallowed as from the 21st day of May, 1909. The pension officer for the area of the county Wexford called upon the suppliant by letter dated the 9th day of July, 1909, to refund the sum of £5 5*s*., the total sum received by her as pension from the 1st day of January, 1909, to the 21st day of May, 1909.

The suppliant prayed (1) for a declaration that the re-investigations purported to have been made as set forth in paragraph 5 of the petition were *ultra vires* and void, and that the order made or purported to be made by the Local Government Board for Ireland on or about the 30th day of April, 1909, might be set aside and rescinded, on the grounds that the said re-investigations were held, and the said order was made without jurisdiction, inasmuch as an investigation having been previously made, and a decision having been arrived at that the suppliant was of the statutory age of seventy, and no appeal having been taken from the said decision as prescribed by the said Act, the said committee or sub-committee

and Local Government Board had no jurisdiction to re-open her case on the question of age. (2) That she might be declared entitled to the said pension of five shillings per week, and be paid all arrears thereof, and (3) costs.

An answer and plea was filed by the Right Hon. the Attorney-General for Ireland on behalf of His Majesty the King as follows:—

1. On or about the 24th day of March, 1909, the pension officer for the county of Wexford, being the duly appointed officer for the area in which the suppliant resided, duly raised a question in the manner provided by the Old Age Pension Act, 1908 (8 Edw. 7, c. 40), and the regulations thereunder, with reference to the pension granted to the petitioner as stated in paragraph 3 of the petition, to the effect that the suppliant was not entitled to receive a pension under the said Act, as she had not fulfilled the statutory conditions, inasmuch as she had not attained the age of seventy years. The local pension committee having given its decision thereon, the said question was duly brought before the Local Government Board for Ireland on an appeal by the said pension officer in the manner provided by the said Act, and the regulations thereunder, whereupon it was decided by the said Local Government Board that the suppliant was not entitled to any pension.

2. The Attorney-General further says that at the time the said question was raised by the pension officer in the manner set out in paragraph 1 hereof, new facts relating to the age of the pensioner, the existence of which had not been known on or prior to the 9th day of December, 1908 (being the date of the decision of the local pension committee, or sub-committee, referred to in paragraph 3 of the petition), had been ascertained, and additional evidence in relation to the pensioner's age, which had not, on or prior to the said 9th December, 1908, been discovered, had come to the knowledge of the said pension officer. These facts and this additional evidence were laid before the local pension committee by the said pension officer in the investigation of the question raised by him as aforesaid; but the local pension committee refused to alter their previous decision dated the 9th day of December, 1908, allowing a pension of five shillings per week. The said pension

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officer appealed to the Local Government Board in the manner provided by the Old Age Pensions Act and the regulations thereunder, and on the hearing of the appeal laid before the Local Government Board the said new facts and said additional evidence. On said appeal the Local Government Board held the suppliant was under seventy years of age, and on this ground determined that the suppliant was not entitled to a pension.

3. All notices were served, and all steps taken as required by the said Act, and the regulations thereunder, for the raising, hearing, and determination of said question.

4. The suppliant ought not to be admitted to say that she is entitled to the said pension, or all or any of the arrears thereof, because before the filing of the petition, viz., on the 18th day of May, 1909, the Local Government Board for Ireland, being the appellate body appointed under the Old Age Pensions Act, decided that she was not entitled to a pension, and the said decision still remains in full force and effect.

The petition was heard on the 8th day of November, 1910, before the Hon. Mr. Justice Dodd, without a jury. The learned judge reported that counsel for the suppliant stated that the question in the case had been already determined in the King's Bench Division against the contention of the suppliant: *The King* (*Sinnott*) v. *Local Pension Committee, Co. Wexford* (1). No evidence was offered; and, on the application of counsel, the learned judge allowed an amended reply to be delivered by the suppliant, so as to raise the net question whether the first order of the pension committee, establishing the suppliant's right to a pension, was final and conclusive on the question of age; and, on the pleadings so amended, the learned judge dismissed the petition without costs, the arrangement between counsel for the suppliant and the Crown being, that in the event of the point being ultimately decided in favour ef the suppliant, the prayer of the petition was to be granted without evidence or further inquiry.

The amended reply of the suppliant was as follows:—The suppliant, admitting the allegations in the answers, says that the alleged re-investigation, referred to in the answer and plea. was

(1) [1910] 2 I. R. 403.

wholly without jurisdiction and void; and that the first decision referred to in paragraph 3 of the petition is final and conclusive on the question of age.

On the 10th day of November, 1910, the suppliant applied to the King's Bench Division (Madden, Kenny, and Wright, JJ.) for an order that the judgment, dated the 8th day of November, 1910, of the Hon. Mr. Justice Dodd, should be set aside, and that in lieu thereof judgment might be entered for the suppliant in the terms of the prayer of the petition, or, in the alternative, for a new trial of the said petition, which application was refused, with costs.

The suppliant having died subsequent to the decision of the King's Bench Division, this appeal was now brought to the Court of Appeal by her personal representative.

James O'Connor, K.C., and *Lupton*, for the appellant:—

We admitted at the trial of the petition, and before the Divisional Court, that this case was ruled by *The King* (*Sinnott*) v. *Local Pension Committee, Co. Wexford* (1); but that case is not binding on this Court, and should not be followed. Our net contention is, that the first decision of the local pension committee, awarding the suppliant an old age pension, against which an appeal was brought, as prescribed by section 7 (1 *c*) of the Act, was "final and conclusive" on the question of the suppliant having attained the statutory age of seventy. The wording of section 7 (2) is clear as to this. We admit that that decision could be re-opened if it had been obtained by fraud, or if there had been a subsequent change in what may be termed the "fluctuating conditions" of the pensioner, *e.g.*, a change of pecuniary means, or if the statutory conditions necessary to be fulfilled ceased to be so; but none of these circumstances have arisen. Once an applicant has satisfied the local pension committee that he has attained the statutory age of seventy, and the committee has awarded the pension, then, when no appeal is brought, the question of age is finally disposed of. That condition is a fixed one, and no new facts can occur to displace the right. The local pension committee, subject to the

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appeal provided for by the Act, is the special tribunal chosen for the awarding of the pension, and has complete jurisdiction, including jurisdiction to determine the question of age. That jurisdiction is determinable "at the commencement, and not at the conclusion, of the inquiry": per Lord Denman in *The Queen* v. *Bolton* (1), cited by Lord O'Brien, L. C. J., in *The King* (*Martin*) v. *Mahony* (2). As to the meaning of the words "final and conclusive" in section 7 (2), see *The Queen* v. *Overseers of Napton* (3); *Death* v. *Harrison* (4); *Westminster Corporation* v. *Gordon Hotels, Ltd.* (5); *Wakefield Corporation* v. *Cooke* (6). Section 9 (2) of the Act will be relied on by the Crown; but that sub-section has no application to the condition of the applicant having attained the statutory age, when, as in the present case, the question as to age has been finally found in favour of the suppliant, and that finding by the local pension committee furnished a complete answer to any claim by the Crown for repayment of sums paid in respect of the pension.

[They also referred to *The King* (*De Vesci*) v. *Justices of Queen's Co.* (7); *In re North-Western Rubber Co., Ltd.*, and *Hüttenbach & Co.* (8); *Attorney-General* v. *Barrett* (9).]

The Attorney-General (*The Rt. Hon. Redmond Barry, K.C.*), *Ronan, K.C.*, and *W. E. Wylie*, for the Crown:—

Our contention is set out in the answer and plea. We submit that on new facts relating to the age of the pensioner, which were unknown at the time of the pension being awarded, coming to the knowledge of the pension officer, the latter was clearly entitled to raise a "question" under the provisions of the Old Age Pensions Act, 1908, and to appeal to the Local Government Board from the decision of the local pension committee. Looking to the scope of the Act, taken as a whole, we say that no person is entitled to a pension thereunder, unless in his case the statutory conditions, including the condition as to age, are fulfilled, and

(1) 1 Q. B. 66.
(2) [1910] 2 I. R. 695, at p. 706.
(3) 25 L. J. Q. B. 296.
(4) L. R. 6 Ex. 15.
(5) [1907] 1 K. B. 910; [1908] A. C. 142.
(6) [1904] A. C. 31.
(7) [1908] 2 I. R. 285.
(8) [1908] 2 K. B. 907.
(9) I. R. 3 Eq. 392.

continue to be fulfilled during the receipt of a pension. In the present case, as the averments in the answer are admitted, it must be taken as established that the suppliant had not in fact attained the age of seventy when she was awarded a pension. The decision of the local pension committee awarding her a pension was, accordingly, a nullity; it was made without jurisdiction, as the chief statutory condition, viz., as to age, was not fulfilled; and the committee, by an erroneous decision on this point, could not confer jurisdiction on themselves, or award a pension to an applicant which, if no appeal were taken within the prescribed time, would thereafter be payable during the life of the pensioner. In *Hemphill* v. *Frazer* (1), Lawson, J., said, as regards the jurisdiction of the Land Commission, exercised in that case, "The whole foundation of the jurisdiction depends on the existence of the relation of landlord and tenant; and if that does not exist, there is no jurisdiction." So here the jurisdiction to award a pension depended on the statutory conditions being fulfilled. In *Pawley's Case* (2), each member of this Court, although determining that there the Local Government Board had no jurisdiction to deprive the pensioner of his pension, expressly limited the decision so as not to involve the result sought for in the present case. But, apart from jurisdiction, section 9 of the Act must be given effect to. The word "found" in sub-section 2 of that section implies a finding by some tribunal empowered to investigate the question as to the right of the pensioner to his pension—whether "the statutory conditions were not fulfilled in his case," or whether "he was disqualified for receiving the pension"; and this sub-section involves the right of re-investigation, which was exercised in the present case. This sub-section would be rendered unworkable if the construction sought to be put on section 7 (2) were adopted; and it would be absurd to hold that the decision of the local pension committee being "final and conclusive," the pensioner, in such a case as the present, where the chief statutory condition, viz., as to age, is not fulfilled, would be entitled to go on receiving his pension from week to week, with a concurrent right in the Crown to recover back each sum paid in respect of the

(1) 10 L. R. I. 87, at p. 94. (2) [1910] 2 I. R. 455.

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pension as a debt due to the Crown. *The King* (*Sinnott*) v. *Local Pension Committee, Co. Wexford* (1), was, it is submitted, correctly decided, and should now be followed.

THE LORD CHANCELLOR:—

This appeal raises an important question on the construction of the Old Age Pensions Act. It appears that Elizabeth Murphy on the 26th October, 1908, made a claim for an old age pension.

This claim was referred to the local pension committee. They referred it to the pension officer for inquiry and report, and he reported that the claim might be allowed, and the local pension committee on the 9th December, 1908, decided that the claimant was entitled to an old age pension of 5*s.* weekly.

No appeal was brought within the time prescribed by regulations under section 7 (*c*) of the Act.

After the expiration of the prescribed time new facts relating to the age of the suppliant came to the knowledge of the pension officer, disclosing that the claimant was not seventy years of age, and, therefore, not at all entitled to a pension.

These facts had not been known at or prior to the 9th December, 1908, the date of the decision of the local pension committee, and he accordingly raised a question for the local pension committee, bringing before it these new facts and evidence. That body refused to alter their previous decision, and the pension officer thereupon appealed to the central pension authority—the Local Government Board. This tribunal decided that the claimant was under seventy years of age, and, consequently, was not entitled to any pension. The claimant then brought this petition of right, and the question is whether, under the Act, the decision of the local pension committee of the 9th December, 1908, was capable of being challenged after the prescribed time on the ground of the claimant not having fulfilled the statutory conditions of age when she was awarded a pension.

There are two unanimous decisions of the King's Bench Division on this point in favour of the Crown—(1) *Sinnott's Case* (1), to which the Lord Chief Justice, and Gibson and Boyd, JJ., were

(1) [1910] 2 I. R. 403.

parties; and (2) *Grennan's Case* (1), decided by the Lord Chief Baron, and Kenny and Wright, JJ.

The argument for the appellant is rested on the *prima facie* strong language of the 7th section, especially section 7, sub-section 2. [The Lord Chancellor read the section.] It is said that here the question whether the statutory condition of the claimant having attained the age of seventy stood referred to the local pension committee; this body got a report from the pension officer, and the committee then considered the case, and gave a decision which involved that the claimant had attained seventy, and, therefore, section 7 (2) directly applies.

That sub-section is—"The decision of the local pension committee on any claim or question which is not referred to the central pension authority, and the decision of the central pension authority on any claim or question which is so referred to them, shall be final and conclusive."

I am of opinion, both on the construction of the Act itself, as a whole, and upon a broader ground going to the jurisdiction on which the granting of a pension depends, that the decision of the King's Bench Division was right. The Act must be read as a whole, and sections 1, 2, 7, and 9 must be construed together. Section 1, sub-section 1, is the leading one. "Every person in whose case the conditions laid down by this Act for the receipt of an old age pension (in this Act referred to as statutory conditions) are fulfilled, shall be entitled to receive such a pension under this Act so long as those conditions continue to be fulfilled, and so long as he is not disqualified under this Act for the receipt of the pension." The statutory conditions are conditions for the "receipt," and the leading one is that "the person must have attained the age of seventy." That must not only be fulfilled, but continue to be fulfilled as a condition of "receipt." Both the fulfilment and continuance of the fulfilment are questions which are to be or may be raised and determined, and the 9th section could not be worked unless this were so. That section provides (s.-s. 1):—"If, for the purpose of obtaining or continuing an old age pension under this Act, either for himself or for any other person, or for the purpose of obtaining or continuing an old age

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pension under this Act for himself or for any other person at a higher rate than that appropriate to the case, any person knowingly makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months with hard labour." It is true that sect. 9, sub-sect. 1, applies to a case of fraud, but it applies to the obtaining of a pension, and involves the re-investigation of the question whether the claimant had attained seventy when he or she obtained the pension.

Sub-section 2 is clear:—"If it is found at any time that a person has been in receipt of an old age pension under this Act, while the statutory conditions were not fulfilled in his case, or while he was disqualified for receiving the pension, he, or in the case of his death his personal representative, shall be liable to repay to the Treasury any sums paid to him in respect of the pension, while the statutory conditions were not fulfilled, or while he was disqualified for receiving the pension, and the amount of those sums may be recovered as a debt due to the Crown." "Found" there is equivalent to "determined," and the receipt of an old age pension while the party was under seventy is the most natural and appropriate ground for attracting the obligation of repayment.

This 9th section necessarily involves that there had been some preceding adjudication under which the pension had been wrongly received. Showing "at any time" in the words of section 9, sub-section 2, that a person was not seventy when the jurisdiction of the Act was applied takes away, in my opinion, the jurisdiction on which the procedure depended, and answers both the claim for "receipt," and the legality of the original adjudication. On both the grounds mentioned by the Judges of the King's Bench Division in the two cases I have referred to, I am of opinion that the appeal fails and must be dismissed.

HOLMES, L.J.:—

When the petition of right, presented by Elizabeth Murphy, came for trial before Mr. Justice Dodd, no evidence was offered; and judgment was given on averments and admissions contained in the pleadings. It appears therefrom that the suppliant in October, 1908, duly made a claim for an old age pension under

the Old Age Pensions Act, 1908, and that thereupon the several steps prescribed by section 7 of that statute, and by the Treasury regulations made thereunder, were taken, resulting in a decision of the local pension committee of County Wexford, that Mrs. Murphy was entitled to an old age pension of five shillings per week, into receipt of which she entered on the 1st January, 1909.

It further appears that there having been no appeal from this decision to the central pension authority, the pension officer for County Wexford in March, 1909, raised a question before the local pension committee that the suppliant was not entitled to receive a pension, as she had not fulfilled the statutory condition of having attained the age of seventy years. The committee having in April, 1909, affirmed its former decision, the officer brought the question by appeal before the Local Government Board, being the central pension authority, which on the 18th May, 1909, decided that the suppliant was not entitled to any pension. It further appears that when the pension officer raised the question in March, 1909, new facts and additional evidence relating to the suppliant's age, not known to him at the time of the previous hearing, were laid before the local pension committee; but the nature of such facts and evidence is not stated, nor do the pleadings raise the issue whether in point of fact Mrs. Murphy was or was not at the date of either hearing seventy years of age. The absence of all reference to this matter suggests something peculiar in this litigation—a suggestion strengthened by the circumstance that Mrs. Murphy having died, the proceedings had been continued by her administrator, who can hardly hope thereby to increase her assets. It is evident —indeed it is admitted on both sides—that the object of the petition was to settle a legal question of general importance—that is to say, the effect of a decision under the 7th section of the Act of the local pension committee unappealed from, or if appealed from of the central pension authority.

Counsel for the suppliant contend that such a decision, if it grants a pension, establishes that the claimant was at its date seventy years of age, and that this question can never be raised again before either the local committee or the central authority.

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The Attorney-General disputes this proposition, and submits that on the true construction of the statute the pension officer may subsequently raise the question of age, and have a further decision thereon by the committee and by the central authority on appeal. The same point was considered by the King's Bench Division in the *King* (*Sinnott*) v. *The Local Pension Committee of Wexford* (1); but I am not sure that it was then actually decided by all the Judges of the Court. That, as I understand the case, was an attempt to quash by writ of *certiorari* an order of the Local Government Board disallowing a pension, previously granted, on the ground that the pensioner had not reached the age of seventy; and we have been told that it was assumed during the argument and in the judgment of the Court that he was as a matter of fact under that age. The Lord Chief Justice held that, as the condition relating to age is under all circumstances a condition precedent to the right to a pension, a person who does not fulfil it cannot by means of a writ of *certiorari*, or I may add by any other proceeding in a court of law, obtain payment of it. It is not to be supposed that I differ from this proposition; but as it is not the question raised in the case before us, I express no opinion upon it.

The Attorney-General might have pleaded that the suppliant, at the date of the petition, was not aged seventy; and if he had done so, and if she had failed to discharge the burden of proof which would have rested on her, judgment, according to the view of Lord O'Brien, ought to have been against her. For what, I presume, was a good reason, this course has not been taken; and the controversy has been confined to whether the order of the Local Government Board of May, 1909, deprived the suppliant of the pension which was granted to her by the local committee on the hearing of the claim made by her in October, 1908. The answer to this question depends upon the construction of two or three of the provisions of the statute. The first section provides that every person in whose case the conditions laid down in the Act for the receipt of an old age pension are fulfilled, shall be entitled to receive such a pension so long as these conditions continue to be

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fulfilled, and so long as he is not disqualified under the Act for the receipt of the pension. Section 2 states the three statutory conditions for the receipt of a pension:—(1) The person must have attained the age of seventy; (2) the person must satisfy the pension authorities that for a specified period he has been a British subject, and has had his residence in the United Kingdom; (3) the person must satisfy the pension authorities that his yearly means, as calculated under the Act, do not exceed £31 10*s.* 0*d.* Section 3 relates to disqualifications for receiving, or continuing to receive, an old age pension, notwithstanding the fulfilment of the statutory conditions.

It will be noted that while the second and third statutory conditions are conditions, the existence of which must be established to the satisfaction of what are termed "the pension authorities," there is no reference to those authorities in the first condition nor in the section dealing with disqualifications. There can, however, be no doubt that section 7, which creates the pension authorities, gives them jurisdiction to ascertain whether all the conditions are fulfilled, and whether any of the disqualifications exist. That section enacts that all claims for old age pensions under the Act, and all questions whether the statutory conditions are fulfilled in the case of any person claiming such a pension, or whether these conditions continue to be fulfilled in the case of a person in receipt of such a pension, or whether a person is disqualified for receiving, or continuing to receive, a pension, shall be considered and determined as follows:—It is then provided that the authority for so determining is the local pension committee, with the help of the pension officer, subject to an appeal from its decision to the central pension authority.

These are the pension authorities; and counsel for the suppliant rely strongly on the final clause of section 7, that the decision of the local pension committee on any claim or question which is not referred to the central pension authority, and the decision of the central pension authority on any claim or question which is so referred to them, shall be final and conclusive.

This provision does not give me much help in dealing with the matter now in controversy. There is no doubt that after the decision of the local committee, or the central authority (as the case

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may be), has been given on a particular claim and a particular question, no further proceedings can be taken thereon; but the question of pension or no pension is not thereby finally settled. It must be, and is, admitted that at a later date another claim may be made and another question raised. For example, a person who in 1908 fails to satisfy the pension authorities that he is seventy years of age, or that he has had his residence in the United Kingdom for twenty years before his application, may, two or three years later, be able to show that he then fulfils these conditions. So, too, a man whose yearly means, when he makes his claim, do not exceed £31 10*s.* 0*d.*, may afterwards have his income increased beyond this amount. It is not denied that in such cases there may be another claim for a pension on a question raised by the pension officer, notwithstanding a previous decision. But it is argued that this can only take place when there may be a change in the statutory conditions as time goes on, and does not apply to a decision finding the existence of a condition which must continue.

Applying this argument to Mrs. Murphy's case, it is said that as the committee by granting her a pension in 1908 must have decided that she was then seventy years old, a question that she was under that age in 1909 cannot be raised. The determination of this question depends upon the language of the statute, but before referring thereto, I may be permitted to say that I should be surprised if it supplied no means of correcting mistakes in relation to age.

The first Irish statute requiring the registration of births was passed in 1863, and although the proportion of children baptized soon after birth is probably larger here than in other parts of the United Kingdom, the records of baptisms are either non-existent or very defective.

The consequence is that it is almost impossible to obtain satisfactory evidence of the age of persons who have passed middle life, especially of the poor and uneducated. The matter in controversy is therefore important not only to the taxpayer, but to the claimant. Let me suppose that Mrs. Murphy being unable in 1908 to satisfy the committee that she was then seventy, had her claim dismissed on this ground, and that a month or two later she procured satisfactory documentary

evidence that she was born in 1834. Would she on the hearing of another claim by her be prevented from relying on this evidence, on the ground that it had been decided that she was not seventy in the previous year? But if an adjudication that a claimant was seventy at its date is conclusive, it would seem to me logical to hold that an adjudication that he was not seventy at the date is equally conclusive. Arguments from inconvenience must yield to the clear meaning of an Act of Parliament; but they are of some assistance if there is an ambiguity. I have quoted the opening words of section 7, which prescribe the matters over which the pension authorities are given jurisdiction. Amongst these are "all questions whether the statutory conditions are fulfilled in the case of any person claiming such a pension, or whether these conditions continue to be fulfilled in the case of a person in receipt of such a pension." As a person can only be in receipt of a pension if a decision of a pension authority has declared him entitled thereto, this clause conveys, I think, clearly that such a decision can be reconsidered and reversed. The words "whether these conditions *continue* to be fulfilled," however, create a difficulty by suggesting that the clause is confined to cases in which the conditions had been fulfilled for a certain time, and does not extend to a case like Mrs. Murphy's, where the question would be whether the condition as to age had ever been fulfilled. If the sentence had run, "whether these conditions are fulfilled in the case of a person in receipt of such pension," I should have no doubt that jurisdiction was thus given to the pension authorities to reconsider the question of age; and I am of opinion that this, although clumsily expressed, is what is meant. I should be disposed to so hold even if I had no other guide than section 7; but this construction is confirmed by section 9, sub-section 2, which enacts, "If it is found at any time that a person has been in receipt of an old age pension while the statutory conditions were not fulfilled in his case, he shall be liable to repay to the Treasury any sums paid to him in respect of the pension while the statutory conditions were not fulfilled, and the amount of those sums may be recovered as a debt due to the Crown." The language of this provision is very general, and applies to every case where a person has been in receipt of an old age pension while the statutory condition was not fulfilled.

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It would certainly apply to Mrs. Murphy if she was not seventy when she was receiving a pension pursuant to the first decision. What then is meant by the opening words: "If it is found?" It must mean "found" by some authority having jurisdiction to decide that the statutory conditions were not fulfilled. It cannot refer to a finding in the legal proceedings to recover the debt, as according to the terms of the section the non-fulfilment of the conditions is to be found before those proceedings are taken. As far as I can see the only mode in which this matter can be found is by the pension authorities acting in pursuance of the jurisdiction conferred on them by section 7; and therefore reading the two sections together I hold that the pension officer was entitled to raise again the question previously decided by the local committee, and that the decision of the Local Government Board of May, 1909, was *intra vires* and legal.

It will be observed that I have not based my judgment on the admission in the pleadings of the discovery of new facts relating to the age of the claimant. I have not done so, because I am not prepared to hold that this admission is material. At the same time I cannot conceive either the local committee or the central authority reversing a previous order unless satisfied that new and relevant facts had afterwards come to the knowledge of the pension officer. The public bodies and officers in this country on whom the legislature has imposed the duty of administering such a statute as the Old Age Pensions Act can be trusted to do so fairly and even sympathetically, nor is there any danger that the grant of a pension would ever be reviewed without amply sufficient reason.

CHERRY, L.J.:—

This case does not come before us in a very satisfactory form. No evidence was offered by the suppliant at the trial; and the facts are stated only in a most general way in the petition and answer. What we have to determine is merely an abstract question of law arising on the suppliant's reply as amended at the trial. By that reply the allegations contained in the answer of the Crown

are in express terms admitted to be true. The question really arises upon the second paragraph of the answer; and from it we are bound to assume that new facts, the existence of which was unknown at the date of the original award of the pension, and new evidence in relation to the suppliant's age, came to the knowledge of the pension officer after that date. What these facts are, and what the new evidence is, we are not told; but we are asked to decide that, whatever the new facts may be, and however conclusively the new evidence may prove that the suppliant was under the age of seventy years when she was awarded and while she was in receipt of her old age pension, they cannot affect her right to receive it, inasmuch as the original decision of the local pension committee, from which no appeal was taken, is "final and conclusive" as to her age.

Mr. O'Connor, in his able argument on behalf of the suppliant, was obliged to admit that the words "final and conclusive" at the end of sub-section 2 of section 7 of the Act cannot be taken in an absolute sense. He admitted that, for instance, in case of fraud, a decision of the pension authority could be re-opened. There is no allegation of fraud in the present case; but the admission is important as showing that there must be some limitations to the finality of the decision, even as to facts which were existing at the date of the determination. It is, of course, clear that as regards circumstances which occur after that date, there is no finality. If the means of the pensioner are increased beyond £31 10*s.* 0*d.* per annum, or if he is convicted of an indictable offence, a question may be submitted to the pension committee, and if its decision is adverse, the pension may be stopped. But the argument urged by the suppliant is, that except in case of (1) fraud, or (2) a variation in what were not inaptly styled the "fluctuating conditions," or (3) a disqualification arising after the grant of the pension, no authority can question the right of a pensioner to continue to receive his or her pension, once granted, until death.

There would be a great deal to be said in favour of this construction of section 7, if it were not for the existence of section 9. But I cannot reconcile the second sub-section of the latter section with the view put forward by the suppliant's counsel as to section 7. It is clear to my mind that section 9 (2) deals with all the statutory

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conditions, not merely with those which Mr. O'Connor calls the "fluctuating" ones. If therefore, it be "found" that a man under seventy years of age has been receiving a pension, the money so paid to him can be recovered, notwithstanding a "final and conclusive" decision by the pension committee that he is over that age. It would be absurd to hold that the pensioner should be entitled to go on receiving his pension from week to week, while he is, at the same time, liable to repay, as a debt due to the Crown, each weekly allowance the moment he receives it. The pension must, in my opinion, stop the moment it is "found" that the person claiming it is under seventy, in exactly the same way as if it were "found" that his means exceeded £31 10*s.* 0*d.* per annum.

But how can either of these facts be "found" if, as is contended here by the suppliant, no tribunal has any jurisdiction to inquire into them? If the view put forward be right, it would be a complete answer to any claim for repayment to produce the record of the original "final and conclusive" decision on the claim, and section 9 (2) would have no operation at all. This cannot be. The two sections, 9 and 7, must be read together, and a construction must be put upon each which will allow some scope for the operation of both.

The plain object of section 7 was, to my mind, to exclude, as far as possible, from the jurisdiction of courts of law all questions as to the right to receive, or to continue to receive, pensions; and to vest in the special tribunal constituted by the Act (subject to the right of appeal as therein mentioned) the sole jurisdiction to determine, at any time, such questions. By declaring that its decisions were "final and conclusive," the Legislature meant to provide that they were not to be subject to review by any court, or by any administrative authority. All Courts and all Government officials were to be bound by them, so long as they continued unaltered. That is the only rational interpretation I can give to section 7 (2) consistent with the provisions of section 9 (2) in the same statute.

But how, then, can it be "found" that a person was in receipt of a pension while the statutory conditions were not fulfilled? Plainly, I think, by the submission to the pension committee of another question, as to whether the conditions

"continue to be fulfilled," involving in the first place the right of the pensioner to *continue to receive* his pension, and in the second place a liability to refund what he has already received. Whether that question should be based on new facts, or whether it may be also submitted on newly discovered evidence of facts existing at the time the pension was originally granted, we need not now consider, as both exist in the present case. But I do not myself see how any question can arise unless one or other element is present. I do not think that the committee can be asked to alter its decision upon exactly the same evidence as that upon which the claim was originally allowed. Upon the finding of the committee (or of the Local Government Board on appeal), on any new question submitted to it, if adverse to the pensioner, his right to continue to receive his pension would cease, and a right to recover the previous overpayments, if any, based upon the finding of the committee, would vest in the Crown under section 9 (2).

I have already stated my opinion in *Pawley's Case* (1), that the word "found" in section 9 (2) refers to a determination of a "question" by the pension committee under section 7 (1). I adhere to that opinion still, though with some doubt, as I find that Gibson, J., has taken a different view in his judgment in *Sinnott's Case* (2). But I cannot for myself see how, consistently with section 7 (1), any other tribunal has jurisdiction to investigate the matter—at all events during the life of the pensioner.

I do not think that our decision in the present case can in any way conflict with our previous decision in *The King* (*Pawley*) v. *Local Government Board*, for there no new facts were discovered, and no new evidence was suggested. The Local Government Board attempted to deprive a man of his pension on the very same evidence as that upon which the pension committee had, without any appeal being taken, granted it. Here we have both new facts and new evidence. A question as to these new facts has been submitted to the proper tribunal under section 7, and found

(1) [1910] 2 I. R. 440, at p. 455. (2) [1910] 2 I. R. at p. 412.

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adversely to the suppliant. I cannot see that there was any want of jurisdiction in the tribunal, and, accordingly, I agree that the judgment for the Crown should be affirmed.

Solicitors for the suppliant: *M. J. O'Connor & Co.*
Solicitors for the Crown: *T. T. Mecredy & Son.*

R. ST. J. C.

KEATING *v.* STOREY (1).

K. B. Div. 1910. Oct. 28. Nov. 18.

Practice—Costs—Plaintiff and defendant within same civil bill jurisdiction—Judgment for less than £20 "with costs"—Duty of Taxing-Master to determine question of residence.

Plaintiff, in an action of contract, set forth in his writ that the defendant resided in London, and applied for and obtained an order to serve the writ upon the latter out of the jurisdiction. Upon such service the defendant, by his solicitor, entered an appearance, without prejudice to a notice of motion to remit. At the trial the plaintiff obtained a verdict for £18 17*s.* 6*d.*, and judgment was accordingly entered for him for that amount with costs. Upon the taxation of costs the defendant submitted that the order only gave to the plaintiff such costs, if any, as he was by law entitled to, and tendered to the Taxing-Master an affidavit for the purpose of showing that the defendant had a residence within the same civil bill jurisdiction, and that therefore the plaintiff was not entitled to any costs. The Taxing-Master refusing to receive such affidavit or to consider the question of residence, on the ground that he was bound by the terms of the judgment to tax and give to the plaintiff half the costs—

Held, that such judgment with costs only entitled the plaintiff to such costs as were legally recoverable by him under the General Orders.

That where the amount of such costs, if any, depends on the fact of residence, this fact, which is not in issue at the trial, should be determined on affidavit by the Taxing-Master, with a right of appeal to the King's Bench Division.

Reynolds v. *Enfield Cycle Co.* (3 N. I. J. R. 205) followed.

MOTION by defendant under General Order LXV., Rule 66 (3), to review the taxation of the plaintiff's costs.

The plaintiff, who carries on business as a cycle merchant at Lower Abbey Street, Dublin, issued a writ in the High Court of Justice in Ireland, against the defendant, to recover a sum of £31 10*s.* 11*d.* for goods supplied and work and labour done. The defendant had resided in Dublin, but, for some time previous to the issue of the writ aforesaid, his letters to the plaintiff had been addressed from 18 Berkeley Road, Crouch End, London;

(1) Before MADDEN, KENNY, and WRIGHT, JJ.

K. B. Div. 1910.

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and, in an affidavit resisting the present motion, the plaintiff swore that, prior to certain letters from the defendant, dated respectively 23rd July, 1908, 28th July, 1908, and 10th August, 1908, the defendant, in conversation, had informed him that he was going to reside permanently in England. Plaintiff further swore that in December, 1909, he applied for liberty to issue and serve a writ out of the jurisdiction, and that prior to such application he had made inquiries and could not find that the defendant had any residence in this country, but that he had resided in England, and that the defendant was subsequently served at his London address with the writ of summons and order for service out of the jurisdiction, on 9th March, 1910. The defendant entered an appearance "without prejudice to a notice of motion to remit." He did not, however, at any time move to remit. The action came on for trial before Wright, J., and a common jury, on the 8th and 9th of June, 1910, when the jury found for the plaintiff for £18 17*s.* 6*d.*, and the Judge gave judgment for that amount with costs, and directed that the sum of £15, which had been lodged in court by defendant, be paid out of court in part satisfaction of debt and costs. Counsel for defendant then stated that the defendant had a residence within the same civil bill jurisdiction, and that the judgment should, therefore, be for £18 17*s.* 6*d.*, with costs, if any. Judgment was marked and the costs taxed and certified to the sum of £26 14*s.* 10*d.* Upon the taxation, the defendant raised the preliminary objection that inasmuch as he and plaintiff, at the date of the commencement of the action, resided within the same civil bill jurisdiction, and as the plaintiff had obtained judgment for a sum under £20, the plaintiff, therefore, was not entitled to any costs. The Taxing-Master stated he was bound by the judgment in the action, and proceeded to tax the plaintiff's costs. On the 23rd day of July, 1910, the defendant's solicitors served notice of objection to the said taxation on plaintiff's solicitor, and lodged a copy of same in the Taxing-Office. The defendant's notice of objection came before the Taxing-Master (Master Tandy) on the 28th of July, 1910. The defendant's solicitor appeared in support of the objection, and asked liberty to read an affidavit which defendant had made and served on plaintiff's solicitor; but the Taxing-

Master refused this request, stating that he was bound by the terms of the judgment.

Horan, for the defendant:—

No costs should be allowed, as both parties reside within the same civil bill jurisdiction. "With costs" means with such costs as plaintiff is legally entitled to; it does not mean with "some" costs; it means with costs "if any." The Taxing-Master is the proper officer to determine the question of the residence of the defendant. The defendant's liability depends on residence. The Court should send the matter back to the Taxing-Master, with a direction that he should receive and consider the affidavit tendered by the defendant: *Reynolds* v. *Enfield Cycle Co., Ltd.* (1). [Counsel also referred to *Shrapnel* v. *Laing* (2); *Scott* v. *Bennett* (3).]

Condon, for the plaintiff:

The form of the judgment must mean the plaintiff is to get some costs: *Craske* v. *Wade* (4). The defendant's proper course is to move to set aside the judgment, and not to review taxation: *Ann. Prac.* (1911 ed.), p. 1156, Ord. LXV., R. 27, ss. 39, 41. Defendant's application would defeat the whole principle of taxation: *Re Fletcher and Dyson* (5). Defendant is estopped both by the order to serve out of the jurisdiction and by the form of the judgment.

Cur. adv. vult.

Nov. 18.

MADDEN, J.:—

The plaintiff in this action, which is one of contract, has obtained judgment for the sum of £18 17*s.* 6*d.*, with costs. He relies on this judgment as a conclusive determination by which the defendant is estopped from showing that the parties were in fact resident within the same civil bill jurisdiction. If this were established in fact, the legal result would be that the plaintiff could recover no costs of the action. Order LXV., Rule 4,

(1) 3 N. I. J. R. 205.
(2) 20 Q. B. D. 334.
(3) I. R., 3 C. L. 217, p. 240.
(4) 80 L. T. R. 380.
(5) [1903] 2 Ch. 688.

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provides that when, as in the present case, the plaintiff recovers, exclusive of costs, a sum less than £20 in an action of contract, and the parties reside within the jurisdiction of the Civil Bill Court in the county in which the cause of action has arisen, the plaintiff shall not be entitled to any costs, "unless at the trial of such cause the Judge shall certify under his hand, on the certificate of the Registrar, or other proper officer, either that the case was one which could not have been tried in the Civil Bill Court, or that, although within the jurisdiction of the Civil Bill Court, it, nevertheless, was a fit case to be tried in the High Court, or (in case there shall be no trial) unless the Court or Judge shall, on motion, make an order to the like effect."

This rule contains express negative words: "The plaintiff in any such action shall not be entitled to any costs" in the absence of the prescribed certificate, which must be given by the Judge at the trial. The Rule has the effect of an Act of Parliament; and, as no certificate was given, deprives the plaintiff in an action like the present of all costs, if in fact the defendant is resident within the same civil bill jurisdiction, and the amount recovered is less than £20.

It is, however, contended by the plaintiff that the question of residence cannot now be raised by the defendant; that the judgment in the action, by declaring the plaintiff entitled to costs, amounts to a judicial decision that the parties were not resident within the same civil bill jurisdiction; and that the defendant is estopped from giving evidence to the contrary. On the other hand, it is contended that the question of residence was not in issue in the action, and that the judgment, in legal effect, declares the plaintiff entitled to such costs, if any, as he was entitled to by law. It is evident that the Judge who tried the case intended to give no more; otherwise he would have given a certificate under the provisions of the Rule.

In my opinion, the effect of the judgment is to award to the plaintiff costs legally recoverable by him under the General Order. Where the amount of such costs, if any, depends on the fact of residence, this fact, which is not in issue at the trial, should be determined on affidavit by the taxing officer, with a right of appeal to this Court.

The question before us has no reference to jurisdiction, which has been concluded by the order to serve out of the jurisdiction of the Court. It is consequent on the recovery of the judgment, and is, in our opinion, properly raised on the taxation of costs.

This is the principle of the decision in this Court affirmed by the Court of Appeal in *Reynolds* v. *Enfield Cycle Co.* (1). In that case the plaintiff had obtained a judgment, which was evidently for £180, with costs, in the ordinary form, without special certificate. That judgment was subsequently reduced by the Court of Appeal to £41 2*s.* 7*d.* The case thus was brought within the rule now represented by Ord. LXV., R. 65 (41), which provided that—"The costs of more than two counsel shall not be allowed in causes or matters which, in the case of a plaintiff, having regard to the amount recovered or paid in settlement, or the relief awarded, and in the case of a defendant, having regard to the amount sued for, or the relief claimed, could have been brought in the County Court, unless the Judge at the trial shall certify under his hand, on the certificate of the Registrar or other proper officer, that more than two counsel were reasonable and proper."

It was established that the defendants, though a limited liability company, having a registered address in England, had in fact a residence in Dublin. The judgment being reduced to an amount within the jurisdiction of the County Court, the costs of more than two counsel were not recoverable without a certificate from the Judge. No such certificate was asked for or given at the trial. The Lord Chief Baron expressed regret that there is not some procedure by which when a case, as presented to the Judge at the trial, does not require a certificate, the propriety of giving such a certificate could be considered at a future stage. His observations apply to the present case. The plaintiff has lost his opportunity of getting the required certificate. This, however, is the result of a statement which may have been inaccurate, and one for which he is responsible. The importance of the decision to which I have referred is that it recognizes that the proper time for determining the question of residence for the purpose of applying the Rules of Court is on the taxation of costs. The

(1) 3 N. I. J. R. 205.

K. B. Div. 1910. KEATING v. STOREY. Madden, J.

Lord Chief Baron says:—"The first question would have been the scale applicable to the taxation and the various rules applicable to the taxation. When that depends upon an external fact, that is the residence of the defendant, it necessarily follows that he (the Taxing-Master) must determine that question of fact, and determine it upon affidavits."

Here the application of the Rule depends upon precisely the same external fact—the residence of the defendant.

This question of fact was properly brought before the Taxing-Master upon affidavit; it must be sent back to him for adjudication upon affidavit.

KENNY and WRIGHT, JJ., concurred.

Solicitor for plaintiff: *John M'Padden.*

Solicitors for defendant: *Horan & Devine.*

J. M.

K. B. Div. 1910. Dec. 5.

HUGHES *v.* THE DUBLIN UNITED TRAMWAYS COMPANY (1896), LIMITED (1).

(1910. No. 4864.)

Practice—New trial motion—"Misdirection and non-direction"—Insufficient statement of grounds in notice of motion—Order XXXIX, Rule 3—Costs.

A notice of motion for a new trial, grounded upon misdirection and non-direction of the Judge at the trial of the action, should state specifically the particulars as to misdirection and non-direction upon which the moving party intends to rely.

Pfeiffer v. *Midland Railway Co.* (18 Q. B. D. 243) followed.

MOTION to set aside a notice of motion for a new trial (2).

The plaintiff in the action, Patrick Hughes, was a van-driver in the employment of Messrs. Boland, and on the 28th July,

(1) Before LORD O'BRIEN, L.C.J., and BOYD, J.

(2) Order XXXIX, Rule 3, of the Rules of the Supreme Court (Ireland), 1905, provides as follows:—"Every application for a new trial shall be by notice of motion, and no rule *nisi*, order to show cause, or formal proceeding other than such notice of motion, shall be made or taken. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of."

1909, in the course of his employment was driving a van across Aungier Street, in Dublin, when one the tram-cars of the defendant company collided with the van, throwing the plaintiff to the ground. The plaintiff brought an action against the defendant company claiming damages for injuries caused by the negligent driving of the defendant company and their servants. The defendants, by their defence, denied negligence, pleaded contributory negligence on the part of the plaintiff, and as an alternative defence lodged the sum of £25 in Court. The action was tried before Dodd, J., and a common jury on the 15th and 16th November, 1910, and at the trial the defendants obtained leave to amend the defence by the addition of a plea that the plaintiff had obtained compensation under the Workmen's Compensation Act, 1906, and was, therefore, not entitled to sue for damages. It was proved at the trial that the plaintiff had been paid a sum of £2 8*s.* 6*d.* by the manager of Messrs. Boland some time after the accident. The jury found that the motorman of the tram was negligent in not keeping a proper look-out, and in not stopping when he saw the van approaching, and that the collision was caused solely by the negligence of the motor-man. The jury found in the negative all questions left as to contributory negligence on the part of the plaintiff, and also found that the plaintiff had not received, agreed to accept, or accepted, the sum of £2 8*s.* 6*d.* as compensation under the Workmen's Compensation Act, 1906. Damages were assessed at £725, and judgment was entered on the findings for the plaintiff for £725 with stay of execution.

On the 22nd November, 1910, the defendants served a notice of motion for an order to set aside the verdict and judgment in the trial, or for a new trial of the action, on the "ground of misdirection and non-direction of the learned Judge," and that the verdict and judgment were against the evidence, and the weight of evidence, and perverse. On the 25th November the plaintiff's solicitors served a notice on the defendants requiring within forty-eight hours particulars of the grounds of misdirection and non-direction of the learned Judge mentioned in the defendants' notice, and as to whether all or part only of the findings were complained of. No particulars having been given, the plaintiff

K. B. Div. 1910. HUGHES v. D. U. T. Co.

on the 29th November served upon the defendants notice of motion to set aside the defendants' notice of 22nd November, on the grounds that the same was irregular in not complying with Order XXXIX, Rule 3, of the Rules of the Supreme Court (Ireland), 1905, and was embarrassing.

James O'Connor, K.C. (with him *E. S. Murphy*), for the plaintiff :—

The defendants' notice does not comply with Order XXXIX, Rule 3, and is defective in two particulars—(1) in not stating the grounds of the application in other than general terms, and (2) in not stating whether all or part only of the findings is objected to. "Misdirection" is too vague : the party opposing the motion should be in a position to know what is the misdirection relied on : it is not fair that he should have to wait to find out his opponent's case until the Judge's notes have been read by his opponent. There was no suggestion of misdirection at the trial. Our notice of the 25th November requiring particulars has not been complied with. We are entitled to know what is the position taken up by the defendants : *Pfeiffer* v. *Midland Railway Co.* (1) ; *Murfett* v. *Smith* (2) ; *Taplin* v. *Taplin* (3). In all these cases objection was taken at the hearing of the new trial motion ; that is in our favour ; the proper time to take an objection to an irregular notice is before the hearing. The object of the notice is to give the opposing party clear notice of what is the subject of complaint.

Herbert Wilson, K.C., and *A. M. Sullivan, K.C.* (with them *T. D. Sullivan*), for the defendants.

The plaintiff's notice goes too far ; our notice is grounded on both misdirection and non-direction. We have always been ready to supply particulars as to misdirection. We replied to their notice of the 25th November that the particulars that we gave would be replied to in due course ; they have served the present notice in reply. If we are right that there should have been a direction at the trial, then every word of the Judge's direction

(1) 18 Q. B. D. 243. (2) 12 P. D. 116. (3) 13 P. D. 100.

was a misdirection; non-direction covers misdirection, and the plaintiff's notice seeks to strike out all the grounds.

E. S. Murphy, in reply:—

This application is necessary to the plaintiff; the notice must be challenged. The defendants' notice is void under Order XXXIX, Rule 3. The party moving for a new trial should do so after having considered his position. The defendants' notice is a "fishing" notice, and is clearly bad on the authorities.

LORD O'BRIEN, L.C.J.:—

This case has been very well presented. The conclusion that we have arrived at is that both parties are in the wrong—the one has not gone far enough, the other has gone too far. Having regard to the English cases cited by Mr. O'Connor, we think that a statement of the specific grounds of misdirection and of non-direction relied on should have been given. It is not stated in the notice of motion for a new trial what these grounds are. We think the other grounds relied on in the notice are sufficiently stated. We give the Tramway Company liberty to amend as to the misdirection and non-direction; they must state particulars as to these within four days. As both parties are in the wrong, we will not give costs. Each party will abide their own costs of this application.

BOYD, J.: I concur.

Solicitors for the plaintiffs: *William Smyth & Son.*
Solicitors for defendants: *O'Connor & Dudley.*

C. N. K.

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1910.
Dec. 15, 16.
1911.
Jan. 17.

JOHNSTON *v.* McKENZIE (1).

(1910. No. 5729.)

Solicitor—Lien—Charging order—Property recovered or preserved—Judgment for costs—Cross-judgments—Set-off—Legal Practitioners (Ireland) Act, 1876 (39 & 40 *Vict. c.* 44), *s.* 3—40 & 41 *Vict. c.* 56, *s.* 62—*R. S. C. Order LXV, Rule* 18.

The defendant having obtained in this action judgment with costs against the plaintiff, and the plaintiff having subsequently recovered judgment with costs in an action for rent against the defendant, on which execution was issued, and a return of *nulla bona* made, defendant's solicitor, who had obtained for defendant the said judgment with costs, applied for a charging order on such costs under 39 & 40 Vict. c. 44.

Held—(1) That such costs were "property recovered" within the statute in respect of which an order of charge could be made; (2) that a set-off in respect of the costs of plaintiff's judgment to the prejudice of the solicitor's lien should not be allowed; (3) that the statute 40 & 41 Vict. c. 56, sect. 2, created no right of set-off, and did not affect the solicitor's right to a charging order.

Quære the effect of the proviso in that section.

Nature of lien and the effect of the above statutes discussed.

Motion on behalf of William Buckley, the solicitor for the defendant, for an order that the said William Buckley should have a charge upon the judgment and costs of suit entered for the defendant, for his costs, charges, and expenses of and in reference to the action; and for an order giving liberty to issue execution upon foot of same.

The following statement of the facts is taken from the judgment of Gibson, J.:—

The defendant brought an action of negligence against plaintiff, her landlord, which was remitted, and dismissed by the Recorder with costs, defendant (then plaintiff) not appearing. To resist the remitting motion, defendant made an affidavit of means, which was successfully met by an affidavit from the plain-

(1) Before Lord O'Brien, L.C.J., and Gibson and Boyd, JJ.

tiff (then defendant). The truth of that affidavit was verified by the sheriff's return of *nulla bona* in an execution for the plaintiff's costs. In the present year the plaintiff brought an action of common law forfeiture for non-payment of rent, a year's rent not being then due; and judgment was obtained therein by the defendant, with costs, the subject of the present motion. A stay of execution for twenty-one days was granted, and the interval was utilized by the plaintiff to bring an action for rent, in which judgment with costs was recovered in November. Defendant's solicitor instituted the present motion to obtain a charge for his costs in respect of the ejectment action on the 3rd December. On the 5th December plaintiff lodged a writ of *fi. fa.* in the rent action. On this writ a return of *nulla bona* had been endorsed, but the writ itself had not been returned by the sheriff.

Mr. Buckley, in his affidavit in support of the application, stated, *inter alia*, that the defendant had informed him that she was unable to pay any part of the costs; that he was not aware of the existence of any assets of the defendant which could be made available for the payment of his costs, and knew of no means by which he could recover the same from her, or at all, if he was not allowed to charge the costs upon the judgment and costs of suit entered for the defendant. He further stated that he had instituted the present motion solely in protection of himself, and not in any way in the interest of the defendant.

J. E. F. Condon, for William Buckley, the applicant:—

The judgment in the present action for the defendant, with costs, constitutes "property recovered" within the meaning of sect. 3 of the Legal Practitioners (Ireland) Act, 1876: *Dallow* v. *Garrold* (1). The plaintiff has no right to set off as against this judgment the judgment obtained by him in the action for rent, to the prejudice of the lien of the defendant's solicitor: *Ex parte Cleland, re Davies* (2). The lien of the solicitor is paramount to all other claims on the fund: *Shippey* v. *Grey* (3); *Cormick* v.

(1) 14 Q. B. D. 543. (2) L. R. 2 Ch. 808.
(3) 49 L. J. C. P. 524.

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Ronayne (1); *M'Larnon* v. *Urban District Council of Carrickfergus* (2). The case does not come within section 62 of 40 & 41 Vict. c. 56, since there is no money in the hands of the sheriff, nor cross-writs of execution lodged with him.

O'Malley v. *Brabazon* (3) is distinguishable from the present case on three grounds: (*a*) cross-writs of execution were in that case in the hands of the sheriff; (*b*) the application was made not by the defendant's solicitor (as here), but by the defendant himself; (*c*) there was no evidence that the defendant was not a mark for the costs, or had ever been asked to pay them. In the present case it is clear from the statement in Mr. Buckley's affidavit that the defendant has no means of paying his costs; and this is further borne out by the fact that Mrs. M'Kenzie's action of negligence was remitted on the ground of her want of visible means, and by the returns of *nulla bona*. In *Maher* v. *Daly* (4) cross-writs of *fi. fa.* had been lodged with the sheriff. In *Croghan* v. *Maffett* (5), it was not shown that the costs could not be otherwise recovered, and the decision was on this ground.

Order LXV, Rule 18, allowing a set-off for damages or costs notwithstanding the solicitor's lien, does not apply to costs in distinct and independent proceedings: Wylie's Judicature Acts, p. 891; Annual Practice for 1911, p. 1119; *David* v. *Rees* (6); *Edwards* v. *Hope* (7); *M'Cormack* v. *Ross* (8), *per* Johnson, J. (p. 554); *Hassel* v. *Stanley* (9); *Bake* v. *French* (10).

The applicant is entitled to the further order asked for to issue execution against the plaintiff on foot of the charge: *M'Aleavy* v. *M'Aleavy* (11).

Bartley, for the plaintiff:—

The plaintiff in this action has already lodged a *fi. fa.* with the sheriff for the amount of his judgment for rent, and the order asked for would prejudice his rights under this judgment. In

(1) 22 L. R. Ir. 140.
(2) 4 New Irish Jurist, 6.
(3) 15 L. R. Ir. 561.
(4) 25 I. L. T. R. 16.
(5) 28 L. R. Ir. 97.
(6) [1904] 2 K. B. 435.
(7) 14 Q. B. D. 922.
(8) [1894] 2 I. R. 545.
(9) [1896] 1 Ch. 607.
(10) [1907] 1 Ch. 428.
(11) 9 L. R. Ir. 165.

Maher v. *Daly* (1) it was decided that "an order under the Legal Practitioners (Ireland) Act, 1876 (39 & 40 Vict. c. 44), will not be made after the lodgment of a writ of *fi. fa.* with the sheriff where a right of a party to the action who has lodged a cross-writ of *fi. fa.* would be affected." This case, taken in conjunction with *O'Malley* v. *Brabazon* (2), shows that the effect of section 62 of the County Officers and Courts (Ireland) Act, 1877, is to give persons who have cross-judgments in separate actions a statutory right of set-off which is paramount to the solicitor's lien. This view is confirmed by the case of *Ward* v. *Haddrill* (3). The 150th section of the County Courts Act of 1888 provides that where parties have cross-judgments against each other, the smaller judgment is to be deducted from the greater, and execution issued for the difference. In *Ward* v. *Haddrill* (3) it was held that the effect of this provision was to give the parties a statutory right of set-off which was paramount to the solicitor's lien. In any event the Court has a discretion, and under the circumstances of this case the discretion should be exercised against the applicant. If the costs had been incurred in the same action, they would be set off as a matter of course without regard to the solicitor's lien, and in the present matters the same solicitor has acted for the defendant in all the proceedings—in the proceedings in which the defendant was defeated, as well as the proceedings in which the defendant was successful. There is, therefore, no equity in favour of the solicitor. Prior to the Rules of 1832 no uniform practice existed. See Stokes on Solicitor's Lien, p. 102, and Atkinson on Solicitor's Lien. The present practice is governed by Order LXV, Rule 18, which gives the Court a discretion to allow a set-off for damages or costs without regard to the solicitor's lien. In *Goodfellow* v. *Gray* (4) damages were set off in different actions without regard to the solicitor's lien. In the present case there is no sufficient evidence that the defendant herself is unable to pay her solicitor's costs. On the remitting motion she swore an affidavit that she had ample means to pay costs, and she has filed no affidavit on this motion.

Condon, in reply.

Cur. adv. vult.

(1) 25 I. L. T. R. 16.
(2) 15 L. R. Ir. 561.
(3) [1904] 1 K. B. 399.
(4) [1899] 2 Q. B. 498.

K. B. Div. 1911.

JOHNSTON *v.* MCKENZIE. Jan. 17.

LORD O'BRIEN, L.C.J.:—

This is a motion brought by the applicant, Mr. Buckley, to get a charging order on a certain judgment for costs obtained by his client, Mrs. McKenzie, in a suit brought by the plaintiff, Mr. Johnston, against the defendant, Mrs. McKenzie. What is sought is, in the language of the notice of motion, "an order that the said William Buckley, the solicitor for the defendant in this action, shall have a charge upon the judgment and costs of suit entered for the defendant for his costs and charges and expenses of and in reference to this action." In the action, which was a common law ejectment for non-payment of rent, judgment was entered for the defendant, Mrs. McKenzie, with costs. Mr. Buckley relies on the 39 & 40 Vict. c. 44, sect. 3, to found his claim. So said Mr. Condon in answer to me. See also affidavit of Mr. Buckley, paragraph 9. Does the case come under sect. 3 of the 39 & 40 Vict. c. 44? The words of the section are—"Shall have a charge upon the *property* recovered or preserved." This is not asked for specifically at least. What is asked for is a charge upon the judgment and costs. But was there any "property" recovered? Was there any "property" preserved? What is sought here is a charge of costs upon costs—an appropriation of the costs due by Mr. Johnston to Mrs. McKenzie to the payment of the costs due by Mrs. McKenzie to Mr. Buckley. A charge is not sought against the premises preserved—the premises included in the ejectment. What is sought is a charging order on the costs payable in respect of the judgment in the ejectment proceeding. I have dealt with the case on the assumption that Mrs. McKenzie had not any means to pay these costs. I think that is the fair inference from Mr. Buckley's affidavit, and from the other facts, namely, that her action against Mr. Johnston was remitted notwithstanding her affidavit on the remitting motion, and also from the fact that there was a return of *nulla bona* to the writ issued by him.

I have had much difficulty in bringing the case at all within the words of the statute, the Legal Practitioners (Ireland) Act, 1876. It would appear to me that "property" recovered meant a fund, a *corpus*, a subject-matter something different from costs.

Costs flow as a consequence upon a fund or *corpus* being recovered; and as to the word "preserved," it could not at all apply to costs awarded. There were no costs *preserved*, and it would appear to me that the word "recovered" and the word "preserved" are applied to a kindred subject-matter, viz., some fund, some *corpus*, recovered or preserved. I expressed my difficulty more than once during the argument, but it was expressly conceded that the word "property" includes costs, and *Dallow* v. *Garrold* (1) was referred to, and in particular the language of Lord Esher, then Brett, M.R., at pp. 545 and 546 of the report. I am not sure that that case is precisely in point. See the language of Brett, M.R.: "But it is something which has been recovered, the debt and costs were originally in the hands of the judgment debtor, and were recovered from him through the writ of *fieri facias* issued to the sheriff." Could this apply to the present case? There was nothing recovered by any writ of *fi. fa.* However, I shall assume that "costs" are included in the word "property," and this being so, I think that Mr. Buckley is entitled to the charge he seeks—to a charging order, but not to a possessory lien, because there is no fund for costs or otherwise in his actual possession. Nor, in my opinion, is Mr. Johnston entitled to a set-off. The rule that a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (Order LXV, Rule 18), does not apply to costs in distinct and independent proceedings, as the proceedings or actions here were: See *David* v. *Rees* (2) and the cases there cited. See also *Blakey* v. *Latham* (3), and *Edwards* v. *Hope* (4), where it was held that costs in different actions between the same parties would not be set off to the prejudice of the solicitor's lien. See what Johnson, J., said with reference to these two last cases in *M'Cormack* v. *Ross* (5). See also *Ex parte Cleland, re Davies* (6), and *Goodfellow* v. *Gray* (7). The 41 & 42 Vict. c. 56, sect. 63, has been appealed to by

(1) 14 Q. B. D. 543.
(2) [1904] 2 K. B. 435.
(3) 41 Ch. Div. 518.
(4) 14 Q. B. D. 922.
(5) [1894] 2 I. R., at p. 554.
(6) L. R. 2 Ch. App. 808.
(7) [1899] 2 Q. B. 498.

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Mr. Bartley, but I do not think that statute applies to the facts of the case before us. That is applicable where there are moneys in the hands of the sheriff which have been seized by the sheriff. This condition does not exist here. There are no moneys in the hands of the sheriff here, nor cross-writs of execution. Whatever might be the rights of the parties and of the solicitor if there were moneys or cross-writs of execution in the hands of the sheriff, that case does not arise here.

As between Mr. Buckley and Mr. Johnston I am of opinion that the former has the better claim to the fruits of the judgment in the ejectment action, because it was his exertions and money that brought that judgment into existence. He has a lien in the sense pointed out by Sir Andrew Porter, M.R., in *O'Malley* v. *Brabazon* (1) and by Andrews, J., in *Croghan* v. *Maffet* (2), viz., a right that the judgment recovered should stand as a security for his costs. This case is distinguishable from the latter two cases, because in this case it has been shown that the defendant, Mrs. McKenzie, has no means to pay Mr. Buckley's costs, and there are no cross-writs in the hands of the sheriff. *Dallow* v. *Garrold* (3) may not very satisfactorily show that "costs," "mere costs," are "property" within the meaning of sect. 3 of 39 & 40 Vict. c. 44, but the judgment of Lindley, L.J., shows the priority which is given to the solicitor's claim for costs. I think Mr. Buckley should have leave to issue execution against Mrs. Johnston for the sum he claims. See the judgment of the late Vice-Chancellor in the case cited of *M'Aleavy* v. *M'Aleavy* (4). Although I decide against Mr. Bartley, I feel bound to say he argued the case with much ability, exhausting everything that could be said on behalf of his client.

GIBSON, J.:—

This case raises questions of considerable importance as to the rights of solicitors. The facts are simple. [His Lordship set out the facts as above (pp. 118, 119), and continued.] The present position, therefore, is that there is no available writ of *fi. fa.* with the sheriff;

(1) 15 L. R. Ir. 561.
(2) 28 L. R. Ir. 97.
(3) 14 Q. B. D. 543.
(4) 9 L. R. Ir. 165.

no order of set off under the rule has been applied for or made; and the only matter before the Court is whether on the facts stated the Court can or should refuse to give effect to the solicitor's lien. The argument has been directed—(1) to the nature of lien (apart from any statutory enactment), and to the remedies for enforcing it; (2) the nature and operation of set-off; (3) the nature of the charging order created by the statute, and the discretion of the Court in relation thereto; (4) the effect of the statute of 1877, section 62.

1. A solicitor's charging lien at common law has been the subject of many decisions, the earlier of which are admirably summarized in Stokes on Lien. Though the solicitor was not legal owner of the costs, considered as separate from the judgment, and was not *cestui que trust* in respect of such costs, he possessed salvage rights which attached to the fund recovered: *Greer* v. *Young* (1); *Scholey* v. *Peck* (2). The nature of the right is discussed by Lord Cairns in *Cleland's Case* (3), and in *Smith's Case* (4). No dealing with the judgment with knowledge of the lien was allowed to prejudice the solicitor's rights: *Cole* v. *Eley* (5). Accordingly, a person making a payment in disregard of the lien could be compelled to pay the solicitor: *Ross* v. *Buxton* (6), and cases cited by Stirling, J., in his judgment. The lien was enforced by personal order even against a sheriff: *Griffin* v. *Eyles* (7). The right is always described as lien; that is the term used in the General Orders of 1832 (English), and 1834 (Irish), and in those under the English and Irish Common Law Procedure Acts. It is adopted by the House of Lords in *Russell* v. *Russell* (8). It denotes a salvage right which was, like other salvage rights, protected and enforced by the Court. A passive possessory lien on title-deeds is quite different. A salvage lien in shipping and other cases does not depend on possession, but like all liens it requires a substantive order to enforce it.

The law as to garnishee illustrates the nature of the lien. It was at one time supposed that a garnishee order displaced the lien:

(1) 24 Ch. D., at p. 556.
(2) [1893] 1 Ch., at p. 711.
(3) L. R. 2 Ch. App. 808.
(4) L. R. 3 Ch. App., at p. 131.
(5) [1894] 2 Q. B. 180, 350.
(6) 42 Ch. D. 190.
(7) 1 H. Bl. 122.
(8) [1898] A. C. 307.

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Gibson, J

Hough v. *Edwards* (1). But the contrary has been held in subsequent cases, as in *Eisdell* v. *Coningham* (2), where the lien was enforced notwithstanding the garnishee order; *Cole* v. *Eley* (3); *Dallow* v. *Garrold* (4). The principle is that the garnishee order does not give a greater right than the judgment debtor himself possessed. Hence a garnishee order, though prior in time to the solicitor's application, gave no priority, whether before the Act of 1860, giving the right to declare a charge (as in *Eisdell* v. *Coningham* (2), decided in 1859), or after that statute. In *Hough* v. *Edwards* (1) the expression "general lien" is inaccurately used, as a lien on a judgment is not for general costs, but only for the costs in the action: *Stephens* v. *Weston* (5). I cannot reconcile *Hough's Case* (1) with the more recent authorities above cited.

2. As to set-off in reference to cross-actions between the same parties, it was the inflexible rule of the King's Bench to impose as a condition to set-off that the solicitor's lien should not be prejudiced. In the Common Pleas a different rule prevailed, which was disapproved of by Lord Eldon: *Hall* v. *Ody* (6). In the Exchequer the practice was not settled. In Ireland the King's Bench followed the English King's Bench: Batty, pp. 566, 568. The Irish Common Pleas adopted the same course: *Jones* v. *Courtown* (7). The question was set at rest by the General Orders of 1832 and 1834, and those under the Common Law Procedure Acts, which expressly protected the lien from the operation of set-off in case of separate actions. Costs in the same action were, however, set-off: *M'Cormack* v. *Ross* (8).

The old General Orders have been replaced by a rule which, literally interpreted, would appear to give a discretion to allow set-off. The English decisions, however, lay down that the rule should not be allowed to interfere with lien as to costs: *Edwards* v. *Hope* (9); *David* v. *Rees* (10); *Bake* v. *French* (11). As the first of these authorities was decided when our codified rules of 1891 were

(1) 1 H. & N 171.
(2) 28 L. J. Ex. 213.
(3) [1894] 2 Q. B., at p. 187.
(4) 14 Q. B. D. 543.
(5) 3 B. & C., at p. 538.
(6) 2 B. & P. 28.
(7) Ir. T. R. 300.
(8) [1894] 2 Ir. 545.
(9) 14 Q. B. D. 922.
(10) [1904] 2 K. B. 435.
(11) [1907] 1 Ch. 428.

adopted, we must take it that the identical language of our rule, adopted with full knowledge of the English authority, should have a similar construction. It has been held that damages may be set off against damages, but costs are protected from set-off.

3. The statute of 1860, followed by our Irish statute, extended the lien to real estate; it is largely declaratory, and gave a uniform remedy by order of charge in place of the previous personal and injunction orders by which the lien had been enforced. The Act did not alter the nature of the lien, which was a matter of proprietary or salvage right. The authority to charge is discretionary in the sense that the Court is not bound to make the order in every case, but it cannot exercise an arbitrary discretion; it must give effect to the salvage right save where special circumstances would make it inequitable to do so.

That the costs of a successful litigant in a personal action, or in an action where no property was recovered or preserved, would be "property recovered" appears to be decided by *Dallow* v. *Garrold* (1). The language may not be very apt for the purpose, but it would seem unlikely that in the very case of all others where the solicitor required protection, there being no property preserved, the costs which he had earned should be left out of the statutory remedy.

Even if the statute did not apply, I should hold, without hesitation, that the old lien still existed, and should be enforced by some of the former remedies, the Act being intended to improve the solicitor's position, and not to displace or prejudice in any way his existing salvage rights. Mr. Bartley admitted that the costs were "property recovered," and I need not discuss the point further.

Mr. Bartley's argument, founded on the statute, was that the jurisdiction was discretionary, and that on two grounds the Court should decline to make the order.

The first was, that defendant had means; that on the remitting motion she had so sworn; that she had made no affidavit on this motion; and that Mr. Buckley was using his alleged lien in the interest of the defendant, who was quite well able to pay him. In face of the abortive executions, any such argument fails. It is

(1) 14 Q. B. D. 543.

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only in a clear case that the Court would be justified in refusing to give effect to the solicitor's salvage rights. No example of such refusal has been cited from the old cases. The solicitor ought not to be denied his remedy on speculative inferences as to unknown means attributed to the client. In *Harrison* v. *Harrison* (1), the client was under no legal liability to pay the solicitor at all; the case was very special, between husband and wife. The remarks of Bowen, L.J., which were purely *obiter*, should be carefully guarded in application. If the lien is a salvage right attaching to property, as Bowen, L.J., describes it in *Greer* v. *Young* (2), it cannot be defeated without clear proof.

The second reason suggested, rather diffidently, for refusing the order was, that Mr. Buckley had acted for defendant in all the different proceedings; that defendant was an unmeritorious person; and that the solicitor should be punished as *particeps criminis* by loss of costs. This would be, indeed, a dangerous principle to apply; the solicitor is not identified with the client; no example of refusing a charge on any such ground has been cited; and I see no evidence of professional misconduct.

4. The argument mainly relied on was founded on the Act of 1877, section 62, enabling the proceeds of execution in the hands of any sheriff to be taken in execution, subject to the proviso that the right of any person who had previously obtained an order for the attachment or payment of such moneys should not be affected. This enactment has no counterpart in England. The previous state of the law was, that the proceeds of the first execution constituted a debt due by the sheriff, and were not moneys capable of seizure: *Wood* v. *Wood* (3), and other cases in Dixon on Sheriffs. The proviso points to garnishee orders (in reference to which *Hough* v. *Edwards* (4) was supposed to make priority in time the guiding principle), rather than to salvage lien, which exists before and apart from any order of charge, and which could have been enforced against the sheriff by personal order.

According to Mr. Bartley, the section is intended to give a

(1) 13 P. D. 180.
(2) 24 Ch. D., at p. 556.
(3) 4 Q. B. 397.
(4) 1 H. & N. 171.

statutory set-off of the same type as that dealt with in *Ward* v. *Haddrill* (1).

The section is not a set-off section at all. It applies to all execution creditors, and enables them to seize proceeds of a prior execution in the sheriff's hands. It is quite impossible to treat it as creating a statutory set-off, which, on the one hand, would make the judicature rule (enabling a set-off order to be made) inoperative; and, on the other, would deprive the proviso, if it applies to lien at all, of all effect. The rish authorities, if well decided, have no application, as there has been no execution on defendant's judgment for costs. Had an execution thereon been lodged with the sheriff, a serious question might have arisen if, before a charging order had been obtained, the plaintiff had lodged his writ. If the argument of Mr. Bartley was right, it would extinguish the lien, wholly or in part, in every case of cross-judgments; even without execution and without an order of set-off, there would be an implied statutory set-off—an impossible view. None of the cases cited has any application to the facts before us, and I do not discuss or criticize them.

BOYD, J., concurred.

THE COURT made an order declaring the said William Buckley to have a charge upon the judgment and costs of suit entered for the defendant, for his costs, expenses, and charges of and in reference to the action; and giving him liberty to issue execution upon foot of the same against the plaintiff.

Solicitors for the applicant: *William Buckley, Solicitor, in person.*

Solicitors for the plaintiff: *M. J. Hanmore, O'Beirne, & Co.*

J. G. T.

(1) [1904] 1 K. B. 399.

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Jan. 13.
Feb. 24.

ALEXANDER MUNRO, TRADING AS ALEXANDER MUNRO & CO., *v.* THE MALLOW URBAN DISTRICT COUNCIL (1).

(1909. No. 3868.)

"Contract made by a sanitary authority"—"Value or amount" exceeding £50—Seal—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52)—*Ascertainment of value or amount recoverable by contractor on completion—Contract enabling a sanitary authority to terminate contract at pleasure.*

The Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 201, sub sect. 1, enacts that "every contract made by a sanitary authority whereof the value or amount exceeds £50 shall be in writing, and sealed with the common seal of such authority."

The "value or amount" of a contract within the meaning of this enactment is the amount which, in the light of the facts within the contemplation of the parties, and in reference to which the contract is made, would be recoverable by the contractor from the sanitary authority on completion.

In an action by a contractor against a sanitary authority to recover the price of boring four Artesian wells, under separate contracts not reduced to writing, the terms of the contracts contained in correspondence between the parties and resolutions of the authority were, that the plaintiff should proceed with the boring until (*a*) he met with unforeseen difficulties, (*b*) or sufficient water were obtained, (*c*) or a reasonable time had elapsed, (*d*) or the work was countermanded by the defendants. The minimum rates to be charged per day for boring, taken in conjunction with the length of time which the parties expected to elapse before water was found, showed that when the contracts were made, the parties contemplated that the cost of the boring in each case would exceed £50.

Held, that sect. 201, sub-sect. 1, of the Public Health (Ireland) Act applied, and that, as the contracts were not sealed, the plaintiffs could not recover, and that the defendants' right to terminate the work at pleasure did not prevent the application of the Act and section.

MOTION on behalf of the defendants to enter judgment for them on the findings of the jury at the trial. The plaintiffs, who were

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

a firm of artesian well engineers and mineral boring prospectors, by their statement of claim, indorsed upon the writ, claimed a sum of £215 18*s.* 9*d.* as balance of moneys payable to them by the defendants for goods sold and delivered by them to the defendants, for work done, materials provided, and moneys paid at the defendants' request, and for moneys found to be due from the defendants to the plaintiffs upon accounts stated, all between the 16th July, 1908, and the 17th March, 1909. The particulars of the plaintiffs' claim set out seven items claimed on detailed accounts rendered by the plaintiffs to the defendants. The first four items referred to amounts claimed in respect of Artesian well boring operations at Lackinamona, Carriglea, Clostogue, and Skenakilla, respectively. The following respective amounts were claimed:—Lackinamona, account of the 21st October, 1908, £137; Carriglea, account of the 21st October, 1908, £88 19*s.* 2*d.*; Clostogue, account of the 1st December, 1908, £86 5*s.*; Skenakilla account of the 1st December, 1908, £93 12*s.* Items 5 and 7 were claims with reference to the supply of brass pump barrels and accessories, and were, respectively, as to 5, on account of the 23rd December, 1908, £23 5*s.* 6*d.*, as to 7, on account of the 17th March, 1909, £20. Item 6 was a claim of £16 17*s.* 1*d.*, on an account of the 21st January, 1909, for conducting the boring operations, and for fees, fares, and expenses payable by the defendants in connexion therewith. The total amount claimed on the above seven items was £465 18*s.* 9*d.*, against which credit was given for two cash payments, (1) on the 7th November, 1908, of £150, and (2) on the 5th February, 1909, of £100, making together £250.

The specially indorsed writ was served on the 31st March, 1909; and on the 3rd May, 1909, the defendants delivered their defence containing nine paragraphs. The first four paragraphs of the defence were ordinary traverses, and paragraphs 5 to 7 (inclusive) were alternative defences. In paragraph 5 the defendants pleaded that the prices charged by the plaintiffs were not fair or reasonable, but excessive and "contrary to the plaintiffs' price list of terms and conditions and to the rate of remuneration agreed upon between the plaintiffs and defendants for the execution of such works, to wit, 5*s.* per foot for 2½-inch

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bore, with proportional increase for a larger area, so that the cost of same should in no case exceed £1 per lineal foot actually bored." In paragraph 6, the defendants pleaded that only 199 feet 2 inches had been bored, whereas the plaintiffs had charged for 246 feet 2 inches, and, in paragraph 7, that the alleged work was done so negligently and improperly that it was of no value and absolutely useless. Paragraph 9 was a defence of lodgment of £30 in full satisfaction. By paragraph 8 the defendants raised the following defence—"The defendants will submit that this action is not sustainable, inasmuch as the subject-matter of the contract for the execution of the alleged works exceeded £50 in value, and that, in order to render the defendants liable for the price thereof in excess of £50, the same should have been reduced into writing under the corporate seal of the defendants' council."

On the 10th May, 1909, the plaintiffs delivered their reply in which they joined issue on the defence, save as to admissions, contended that the matters pleaded in paragraph 8 of the defence afforded no defence to the action, and pleaded, in reply to paragraph 5 of the defence, that the prices charged and the rate of remuneration agreed upon between the plaintiffs and defendants were the terms provided by the price list and not as alleged. On the same date the plaintiffs served upon the defendants a notice requiring full detailed particulars of the following matters pleaded and referred to in the defence: — (1) The date and place when and where the agreement for remuneration (other than the price list) alleged in paragraph 5 of the defence was made between the plaintiffs and defendants, and a statement whether such agreement was verbal or written and the terms thereof; (2) the place where it was alleged that 199 feet 2 inches of boring was done, but charged for as if 246 feet 6 inches had been done, and by what means that alleged measurement had been computed; and (3) the part or parts of the work alleged in paragraph 7 of the defence to have been done negligently and improperly, and the nature of such negligence or improper work. On the 17th May, 1909, the defendants furnished the following answers to the particulars required:—"(1) The agreement for remuneration alleged in paragraph 5 of the defence was made verbally by the plaintiff with a deputation of the defendants'

council at Tipperary in the month of July, 1908, and the same agreement as to remuneration was confirmed verbally by the plaintiff at an interview with a deputation of the defendants, November, 1908, and subsequently, in a letter to the defendants' council from the plaintiffs, dated the 16th day of November, 1908. The terms of the agreement were in the terms alleged in paragraph 5 of the defence. (2) The gross depth of boring executed to the four wells which the plaintiffs undertook to sink for the defendants amounted to 199 feet 2 inches, and not 246 feet 6 inches, as claimed by the plaintiffs. The four wells referred to are Lackinamona, Skenakilla, Carriglea, and Clostogue, all situate within the Mallow Rural District, in the county of Cork; (3) The negligence mentioned in paragraph 7 of the defence, in the execution of the boring operations referred to in the statement of claim, consisted of insufficient boring to secure an adequate supply of water in the said four wells, and the plaintiffs' omission to cleanse and clear out the bore-holes of each well, and leave the same free from sand and silt, and to tube said bores."

The case was tried before Dodd, J., and a special jury of the city of Dublin on November the 4th and 5th, 1909.

Alexander Munro, a member of the plaintiffs' firm, James Brown, and Angus Reid, were examined on behalf of the plaintiffs. The following is the learned Judge's note of Alexander Munro's evidence, so far as material to this report:—"Meeting, 6th July, with members of council at Greenan. Hayes, Sullivan, Creagh, were there. They asked what this kind of work would cost. I said I had already sent a price list to Mr. Regan on 1st June. Creagh said, 'Could you give us an idea what it might cost without binding you in any way?' I replied, it depended altogether on what we had to do. There was hardness of rock to consider, the size of the bore and depth, and then how high the water might rise in the bore. I said there were pumping tests, which were contained in the price list. Also, from what I thought they would require done there, it would work out about £1 a foot. I had not seen the place at the time. That was what had passed at the interview. One of them asked how long it might take. I said about two or three months to do a well; that again depended upon difficulties. One of them said it took years to finish a well.

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They said one well had cost about £300 or £400, and had to be filled up; it was abortive. I got instructions to see sites and give an opinion. 16th July I went to inspect the sites. Mr. Hayes showed me the positions. Next day I reported personally to members. A board meeting. Creagh reported to the meeting what had occurred at Tipperary, and said if Mr. Munro could do the work for about £1 a foot it would be splendid. . . . I said we had a price list; I had sent it to Mr. Regan (clerk of the council). I said it all depended on what we had to do; but they had the price list there to guide them. Regan read out price list. Never on any occasion did I say I would do the work that is done at £1 a foot. Lachinamona well commenced 29th July, 1908, and on 13th October claim £137 for this; 56 feet bored. Each day it depends on hardness. If we can cut 8 feet of a 2½-inch bore in a day of 8 hours, we charge at 8 feet at 5s.; that is a foot per hour, and is £2 per day. That is the way I work it out; no clerk of works to work it out. . . . I got an order for a deep-well pump 7th September, and letter to send account for Lachinamona; depth, 45 feet; amount charged, £63. The account showed what I actually charged. None of the days had reached 8 feet. Not one day did we do the normal in Lachinamona The lowest on was 8 inches. It was hard limestone. I explained we could not do more than half the normal."

Cross-examined—"Until I reach the rock I charge at my 5*s.* prices. Skenakilla was all from surface boulders, stones, all sorts of mixed stuff. The surface was 2 feet of boulder clay, 18 feet of broken metal."

The evidence of James Brown, so far as is material to this report, was thus stated on the learned Judge's notes:—"I was foreman borer for Munro & Co. I was in charge of the Lackinamona job. I furnished daily report of what I had done. It was the hard kind of limestone. When down about 39 feet made a hand-pump test. . . . We got instructions from Mr. Hayes to go deeper and to widen. 17 feet of widening cost £32. You have three times as much work with a 4½-inch bore as you have with a 2½-inch . . . I was sent to Skenakilla on 15th October. Skenakilla, at 63 feet, was tested. I got orders to stop at Skenakilla. There were some days at Lackinamona we had only three men when we ought to

have had more. It was for the purpose of allowing the pump to go down to test that the widening was made. . . . I was properly supplied with appliance and plant."

Angus Reid was examined as to work at Carriglea and Clostogue. The plaintiff was recalled, and, in answer to the Judge, stated that his account was made up from the account entered in his journal book.

Mr. Regan, referred to in the evidence, was the clerk, and Mr. Hayes the engineer, of the defendant Council.

There were a number of letters between the parties, some of which were referred to in the learned Judge's notes, but which it is not thought necessary to extract in this report.

The following are the material parts of the plaintiffs' price list:—

PRICES FOR ARTESIAN-BORED TUBE WELLS.

Borings, 5s. per foot for any depth up to 100 feet, and for any depth exceeding 100 feet an increase of 1s. per foot additional every 25 feet.

Foregoing rate is applicable to the drilling or cutting into the rock of any size of bore up to 2½ inches diameter. Until the rock is reached it is necessary to drill a larger bore to admit the tubing—malleable iron tubes with screwed joints. Whatever size we may consider necessary for this purpose is charged in proportion to difference of area over 2½ inches diameter bore. Larger bores are charged at the same ratio in respect to size and price.

The above price includes the providing by us of all tubing required till the rock is reached, forming the lining or casing of the bore, also the furnishing of the boring plant, and all labour necessary in the carrying out of the work.

When extra hard rocks or other difficulties are met with, where the progress is not equal to 8 feet of a 2½-inch diameter bore per (eight hours) day, the same is counted and charged as if 8 feet had been cut to a depth of 200 feet, 6 feet to a depth of 300 feet, and 4 feet to any greater depth at the 2½-inch diameter bore rate.

A minimum rate of 40s. per day (eight hours) is charged for men's time travelling to the work, and on completion home again,

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fixing up or dismantling the plant, making pumping tests to prove quantity of water, or in any other way engaged in connexion with the work outside the actual boring operations. Carriage of boring plant and men's fares to and from the ground, as well as travelling expenses for ourselves or representatives when visiting the work, to be an extra charge.

When desirous of getting through with the work as expeditiously as possible, it is optional for us to work overtime, but in such cases overtime is charged at ordinary rates.

Counsel for the defendants asked for a direction on the question of absence of seal. The learned Judge refused, and said he would take the findings of the jury. The defendants called no witnesses. The following is the learned Judge's note as to the argument in law of defendants' counsel :—"Mr. Sullivan asks for a direction on the ground that there is no evidence of contract. By the Local Government Act, 1898, section 33, the Council get power to make wells; ... they are, therefore, the sanitary authority: Public Health Act, section 201; Vanston, 205. They are, therefore, incapable of contracting, save under seal: *Young* v. *Leamington Corporation* (1). *Lanford* v. *Billericay* (2) if applicable only refers to a claim on a *quantum meruit*; the claim here is on contract. He refers to 4 C.P.D., p. 48. The plaintiff cannot succeed on a *quantum meruit*, since no case was made nor question put to the jury based on a *quantum meruit*. I decline to direct, and say I will decide as to what I shall do when the jury have found their verdict."

The jury found for the plaintiffs as follows:—On foot of Lacknamona, £110; Clostogue, £70 13*s.*; Carriglea, £74 14*s.* 2*d.*; Skenakilla, £75, making together £330 7*s.* 2*d.*, from which was deducted the cash payment of £250, leaving a balance of £80 7*s.* 2*d.* On items 5 and 7 of the particulars in the statement of claim the jury found for the plaintiffs the sum of £43 5*s.*, and on item 6 £8 9*s.* 1*d.* The learned Judge declined to enter judgment, leaving either party to move for judgment.

On the 20th November, 1909, the defendants served a notice of motion for an order that the verdict of the jury had on the 5th November, with respect to the causes of action, declared in

(1) 8 A. C. 517, at p. 527. (2) [1903] 1 K. B. 772.

paragraphs 1, 2, 3, 4, and 6 of the statement of claim, should be set aside, and judgment entered for the defendants, on the ground that the learned Judge at the trial should have directed the jury that the aforesaid matters were included in a contract exceeding £50 sued upon against the defendants as a sanitary authority under the provisions of the Public Health (Ireland) Act, 1878, and that no contract with reference thereto was reduced into writing under the seal of the said defendants; or, in the alternative, for an order for a new trial of the action, on the ground that in no event was the plaintiff entitled to sue upon the special contract, and, if entitled, could sue only upon a *quantum meruit.*

On the 30th November, 1909, the plaintiffs served a cross-notice of motion for judgment for the sum of £133 1*s.* 3*d.* and costs, in accordance with the findings of the jury on the 5th November, 1909.

A. M. Sullivan, K.C. with him *Chambers, K.C.*, and *Hon. C. Atkinson*), for the defendants.

We move for judgment on items Nos. 1, 2, 3, 4, and 6 of the statement of claim: we admit the plaintiff's right to judgment on Nos. 5 and 7.

The prohibition against contracts for considerations exceeding £50 which are not under seal provided by section 201 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), is absolute. The plaintiffs cannot recover upon a *quantum meruit*: *Young* v. *Leamington Corporation* (1). If the plaintiffs can recover at all, it must be on a *quantum meruit*, and not with reference to the contract prices: *Lawford* v. *Billericay R. D. C.* (2); Vanston, Public Health, p. 205; *British Ware Co.* v. *Preston U. D. C.* (3); *Hunt* v. *Wimbledon Local Board* (4)

Serjeant Moriarty, K.C. (with him *Powell, K.C.*, and *Gibson*), for the plaintiffs:—

Section 201 of the Public Health (Ireland) Act, 1878 (4), does not apply unless the amount is ascertained to exceed £50 when

(1) 8 A. C. 517.
(2) [1903] 1 K. B. 772.
(3) [1895] 2 Q. B. 463.
(4) 4 C. P. D. 48.

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the contract is made: *Eaton* v. *Basker* (1); *Campbell* v. *Edenderry R. D. C.* (2); *Lawford* v. *Billericay Union* (3). The contracts for the wells were separate contracts; separate payments were made in respect of each well—£150 on the 7th November, £100 to Lackinamona, and £50 to Carriglea; £100 on the 15th February, £50 to Skenakilla, and £50 to Clostogue.

A. M. Sullivan, K.C., in reply.

Feb. 24.

PALLES, C.B.:—

This motion has been argued on both sides as if the only question involved was one of law; whereas the principal matter in dispute is one of pure fact, namely, what was the nature of the contracts under which the work sued for was executed. That depends on whether they answer the description given in section 201, sub-section 1, of the Public Health (Ireland) Act, 1878 (4), which says:—"Every contract made by a sanitary authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority."

In the present case, the contracts were not in writing. Their terms are to be gathered from the resolutions of the defendants, and from the letters and acts of the parties; and ought to have been found by the jury. Neither party, however, requested that that course should be adopted; and, therefore, we must ourselves determine the terms of the contracts as inferences of fact.

I treat the contract for each well as a separate one; and this course is most in favour of the plaintiffs.

The first contract was to sink a well by way of experiment; and if the defendants were satisfied with the plaintiffs' completion of it, then the plaintiffs were to sink four other wells on the same terms as to price, namely, the terms contained in the printed paper, or price list, which has been given in evidence. That price list stipulates that where the progress of boring is not equal to 8 feet of 2½-inch diameter bore per eight hours day, the sum shall be accounted and charged as if 8 feet had been cut to a

(1) 7 Q. B. D. 529.
(2) Judgment of Madden, J., at Nisi Prius, not reported.
(3) [1903] 1 K. B. 772.
(4) 41 & 42 Vict. c. 52.

depth of 200 feet; 6 feet to a depth of 300 feet, and 4 feet to any greater depth at the 2½-inch diameter bore rate. The price for boring shall be 5*s.* per foot for any depth up to 100 feet, and for any depth exceeding 100 feet an increase of 1*s.* per foot for each additional 25 feet. Thus the minimum sum for boring per day of eight hours was to be 40*s.* for work up to 100 feet in depth, 48*s.* for work between 100 and 200 feet, and so on; but under no circumstance could the charge for boring alone be less than 40*s.* per day. In addition to the charge for boring, at the minimum rate of 40*s.* per day of eight hours, there was to be a charge for men's time in travelling to and from the work, fixing up or dismantling plant, making a pumping test to prove the quantity of water, or in any way engaged in connexion with the work outside the actual boring operations; carriage of boring plant, and men's fares to and from the grounds, as well as travelling for the plaintiffs or their representatives when visiting the works, to be an extra charge. Thus the expense of the work would depend upon the time which it would occupy. The contracts were to be completed within a reasonable time; and the reasonable time which one of the plaintiffs' letters shows to have been in the contemplation of the parties at the time of the first contract is stated to be about two or three months. In my opinion, it was a term of this contract that the plaintiffs should proceed with this boring until (*a*) they were met with unforeseen difficulties; (*b*) or water sufficient for the defendants' purposes should be reached; (*c*) or until a reasonable time should have elapsed; (*d*) or until the work should be countermanded by the defendants. I have some doubt as to whether the defendants had, in this first contract, any right at all to countermand the work before the time of completion, unless there were unforeseen difficulties; but in favour of the plaintiffs, I assume that they had.

As regards the other wells, the contracts for which I treat as independent of that for the first—although possibly even this may be subject to argument—they were to be sunk upon the same terms as those of the first well; and the parties when entering into them had the knowledge derived from the length of time occupied in boring the first well. I hold, as a matter of fact, that both parties contemplated, at the time of the contracts, that

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the sum necessary for the completion of each well would be such that the price would exceed £50. This is mathematically demonstrable in reference to the first contract, having regard to the minimum price per day, and the time within the contemplation of the parties for its completion, namely, two or three months; and I deduce it also, as an inference of fact, from the matters in the contemplation of the parties in reference to the other contracts. Thus, to make my meaning clear—supposing, in the case of any one of the contracts, that the plaintiffs, without having found water, and no unforeseen circumstances having occurred, had insisted upon being paid—I should have been of opinion that they were not entitled to payment, that, on the contrary, had the contract been binding, they would have been bound to go on to completion, unless stopped by the defendants, or unless a reasonable time had elapsed, or water had been found. I make that the basis of my judgment. The only question of law which it appears to me can possibly arise is whether, assuming in plaintiffs' favour that the defendants had a right to terminate the work at their pleasure, that right prevents the contracts from coming within the sub-section I have referred to. I am of opinion that it does not prevent the application of the sub-section. I think that the "value or amount" of a contract, within the sub-section, is the amount which, in the light of the facts within the contemplation of the parties, and in reference to which the contract is made, would be recoverable by the plaintiffs from the defendants on completion; and that amount in respect of each of the contracts here is, as I have shown above, £50. The only weight I attribute to the fact that work above the value of £50 has been executed under each contract is as evidence of the natural result, in moneys numbered, of the facts contemplated by the parties at the time of the contracts. Each contract was one under which upwards of £50 might have become due, had it been binding upon the defendants. No doubt there was a possibility that the amount of each might not exceed £50, as I assume, without deciding, that the contracts might have been terminated by the defendants before work to that amount had been executed; but, having regard to the mischief pointed at by the sub-section, viz., the difficulty without specific

enactment of drawing the line between such contracts as these Councils could and could not have entered into otherwise than under seal. I am of opinion that such contracts as we have here, had they been duly executed, would have created a liability in the defendants to pay the stipulated price, and that such a liability, although contingent, brings the contract within the sub-section. A liability under a contract for labour must always, in some sense, be contingent, when the contract price does not become payable until the work is performed. It is hardly necessary to cite authorities; but the case of *Young & Co.* v. *Mayor and Corporation of Leamington* (1) is apposite. There it is stated by Lord Blackburn that contracts by an urban authority for an amount above £50 are absolutely required to be under seal by the corresponding English enactment, which is *totidem verbis* with ours; and that the mere want of a seal prevented the plaintiff from recovering. He says:—"When the subject-matter of a contract exceeds £50 in value, the contract must be under seal; and the distinctions and differences which, according to the opinions of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary corporation, should not do so when the contract was one by an urban authority, and related to a subject-matter above that amount. This was the construction put upon the Act in *Hunt* v. *Wimbledon Local Board* (3), as well as in the Court below (2)." The true *ratio decidendi* in *Eaton* v. *Basker* (4) was the nature of the contract, which differed from those before us here in its essential nature. "The plaintiff there" (5), says Bramwell, L.J., "was not bound to give his services during the whole of the outbreak, and the defendants were not bound to employ him. . . . Suppose (6) that when the plaintiff had earned £20 he had demanded payment of the sum, surely he would have been entitled to claim it; and the value of the contract would not have amounted to £50."

Our construction of the contracts here, as I have already stated, is, that in the analogous event here, the plaintiff would not be

(1) 8 App. Cas. 517.
(2) *Ibid.*, 526.
(3) 4 C. P. D. 48.
(4) 7 Q. B. D. 529.
(5) *Ibid.*, 531.
(6) *Ibid.*, 532.

A. B. Div. 1910. MUNRO v. MALLOW U. D. C. Palles, C.B.

entitled to recover. Baggallay, L.J., agrees with the reasoning of Bramwell, L.J., as to the main points of the case, and Lush, L.J., distinguishes *Hunt* v. *Wimbledon Local Board* (1) on the ground I have already stated, that it must have been known by all parties that the plans would cost more than £50.

In *Hunt* v. *Wimbledon Local Board* (1) the amount was not specified in the contract, and yet it was held to be within the enactment; and this decision was approved of by the House of Lords in *The Leamington Case*. The reason for this decision is stated by Lush, L.J., in *Eaton* v. *Basker* (2), the case upon which the plaintiffs here mainly relied, that there it must have been known to all parties that the plans would cost more than £50; in other words, that the prices of the work contracted for would exceed that amount.

It was, I think, suggested during the argument that sub-section 2 of the section in question, which directs that a pecuniary penalty shall be specified in a contract by a public body in case the terms of the contract are not duly performed, showed that it was intended that a contract should not be within the sub-section unless the value or amount appeared on the face of the contract. Even had that sub-section been mandatory, I should not have yielded to the argument founded upon it; but it is not necessary to discuss that question, as the sub-section has been held to be directory only: *Soothill Upper Urban Council* v. *Wakefield Rural District Council* (3). As to the Irish cases cited, we have not been able to obtain any authoritative report of them; and as, in my view, the question depends upon the nature of each particular contract, we are at present unable to obtain any assistance from them, and especially as I anticipate that the case will be carried further, I do not think it right to defer judgment longer in the hope of obtaining fuller information as to them.

In my opinion, the amounts sued for in reference to these four contracts are not recoverable; but there are some small sums of money due for goods which are recoverable. Our judgment must

(1) 4 C. P. D. 48. (2) 7 Q. B. D. 529.
(3) [1905] 2 Ch. 516.

be for the plaintiffs for £43 only, and for the defendants as to the residue of the sum sued for.

GIBSON and BOYD, JJ., concurred.

Solicitor for the plaintiffs: *Valentine Kilbride.*

Solicitors for the Mallow Urban District Council: *O'Connor & Dudley.*

C. N. K.

M'CARTAN *v.* BELFAST HARBOUR COMMISSIONERS (1).

H. L. 1910.
July 21, 25.

Master and servant—Hiring for particular service—Master whether parting with control of servant to hirer—Negligence causing injury to hirer's servant—Common employment.

The Belfast Harbour Commissioners have under their statutory powers the control of the harbour and of all piers, docks, and quays belonging to it; and it is their duty to assign a berth to a vessel to be discharged in the port, they have power to provide cranes for the unloading of such vessels, and it is their duty to provide proper servants and labourers for working such cranes for the use of the public (2). The master of a vessel hired a crane from the Commissioners for the purpose of her discharge. He signed a request for its use, subject to the Commissioners' regulations, containing an agreement that he was to be responsible for all loss or damage arising from any improper use of the crane while so employed. The crane was put in position by the craneman, and the vessel was moved to a berth opposite it. The practice is that the buckets are filled by the hirer's servants, in the hold, one of whom directs the craneman to raise and lower each bucket, and to swing round the arm of the jib. The craneman regulates by a brake the speed of ascent and descent of each bucket, and he alone works the machine. While the plaintiff, being employed for that purpose by the ship-master, was filling a bucket in the hold, an empty bucket, while being lowered by the crane, descended with great speed and violence, and struck plaintiff, who was seriously injured.

(1) In the House of Lords before THE LORD CHANCELLOR and LORDS ASHBOURNE, JAMES OF HEREFORD, and DUNEDIN.

(2) Harbour Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), ss. 21 and 22, incorporated by Belfast Harbour Act, 1847 (10 Vict. c. lii, sect. 5).

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M'CARTAN v. BELFAST HARBOUR COMMRS.

The craneman was employed and paid by the Commissioners, who alone could dismiss him. Except in directing buckets to be raised and lowered, neither the hirer nor his servants had any control over the craneman. If the ship-master was dissatisfied, his only remedy would be to direct the craneman to stop working, and to apply to the Commissioners to send another in his place, which they might or might not do. In no event could the hirer employ a servant of his own to work the crane, or procure a crane workable on the pier from anyone but the Commissioners.

In an action by the plaintiff against the Commissioners to recover damages for personal injuries, the jury found that the hirer had no authority to control the craneman otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets; that the bucket which injured the plaintiff got out of the control of the craneman, through his negligence; and that this negligence was the cause of the accident.

Held, affirming the judgment of the Court of Appeal in Ireland, that the plaintiff was entitled to a verdict, and that the plaintiff and craneman were not at the time of the accident fellow-servants engaged in a common employment.

Donovan v. *Laing, Wharton and Down Construction Syndicate* ([1893] 1 Q. B. 629) distinguished.

APPEAL by the defendants (the Belfast Harbour Commissioners) from the judgment of the Court of Appeal in Ireland, [1910] 2 I.R. 470, where the facts of the case are fully stated.

Gordon, K.C., and *The Right Hon. James H. Campbell, K.C.* (with them *Andrews*), for the appellants.

Chambers, K.C., and *D. M. Wilson, K.C.* (with them *Williamson*), for the respondent.

July 25.

LORD LOREBURN, L.C. (1) :—

My Lords, I regard this case as one purely of fact, in which no point of law is in dispute. The question on which the decision hinges is this: Was the man whose negligence caused this accident acting as servant of the defendants in doing what led to the mishap, or as servant to the master of the vessel which was being unloaded? For a man who is the general servant of one person may, if lent to someone else for a particular employment, become his servant for anything done in that particular employment.

(1) Printed from the notes of Messrs. W. B. Gurney & Sons.

Various authorities have been referred to, and notably the case of *Donovan* v. *Laing* (1). Your Lordships have been told that you cannot uphold the judgment in this present appeal without overruling that decision. I do not assent. There is no proposition of law ruled in *Donovan* v. *Laing* (1) which is disputable. But the Court there thought that the man who had been lent had become the servant of the borrower in regard to a particular transaction.

Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them, and great numbers of recorded precedents are useful in no other way. But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also. Given the rule of law, the facts of each case must be independently considered, in order to see whether they bring it within the rule or not.

In this appeal it was argued that the craneman had become the servant of the ship "Busy Bee," for the particular employment of using the crane in order to unload the cargo. There was evidence both ways, and the learned Judge asked the jury the following question:—"Had the hirer authority to control Duffy (the craneman) otherwise than in respect of the time and place of movement of the crane and the time of raising and lowering the buckets?" The jury said "No," and also found that the bucket which caused the accident got out of Duffy's control in its descent, and that this was the result of negligence on the part of Duffy.

Now, it would have been more satisfactory if the question put to the jury had been simpler. But, having regard to the course of the trial and the contentions advanced, it is clear to my mind what the jury found. They found that the hirer had a right to direct when and to what place the crane was to be moved, and when the buckets were to be raised and lowered, and that he had no further authority to control what Duffy did. That being so, I think it follows that Duffy was in no sense the servant of the hirer any more than the driver of a hackney cab, hired in the street, is the servant of the hirer, who has a right to direct where

(1) [1893] 1 Q. B. 629.

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Lord Loreburn, L.C.

he is to drive and when. When Lord Justice Bowen in *Donovan* v. *Laing* (1) said that carriage cases were irrelevant, he meant, and indeed said, that they were irrelevant to the point presented in that appeal, which was a disputed conclusion of fact. Your Lordships were asked to treat that expression of opinion as in some way equivalent to a statement of principle. Nothing can better illustrate the difficulty of endeavouring to argue from the facts of one case what inference is to be drawn from the facts of another.

In my opinion, the decision appealed from was right.

LORD ASHBOURNE (2) :—

My Lords, I concur in the conclusion at which the Lord Chancellor has arrived.

The facts of the case are few and simple, and the decision must turn upon their right appreciation.

Chambers, the owner of the "Busy Bee," hired from the defendants the use of a crane for the discharge of its cargo, "subject to the usual rates and regulations relating to the said crane," and with a stipulation that the hirer should be liable for all loss and damage arising from the improper use of the crane.

Neither the application nor memorandum said anything about a craneman, but Duffy, a craneman in the employment of the defendants, went with the crane to work it. Whilst working it he allowed a bucket to fall with a "bang" upon M'Cartan, who was working in the ship, and caused the injuries complained of. He has sued the defendants, treating Duffy as their servant. Duffy was employed and paid by the defendants; he was sent by the defendants to work their crane in the discharge of the "Busy Bee," and the jury have found that the hirer had not authority to control Duffy "otherwise than in respect of the time and place of the movement of the crane, and the time of raising and lowering of the buckets." One of the

(1) [1893] 1 Q. B. 629.

(2) The judgments of Lords ASHBOURNE and DUNEDIN were read by the LORD CHANCELLOR.

witnesses, Keenan, the agent of the ship, said that the craneman would never take orders from him, and he had to go to the harbour. Under these circumstances, at the time of the accident, whose servant was Duffy? It is entirely a question of fact. At the time of the accident had Duffy ceased to be a servant of the appellants because the use of his services had for a particular purpose and for a particular time been transferred to the hirer.

It was pressed in argument by the appellants that the judgment could not be affirmed unless your Lordships were prepared to over-rule the case of *Donovan* v. *Laing* (1). I cannot at all accept this view. I entirely concur in the decision in that case, and on its facts would have arrived at the same conclusion. Its facts, however, were not the same as the facts in this case.

In *Donovan's Case* (1) there was a written contract to supply the borrower with a crane with a man, whenever it might be required, for loading or unloading ships. They were transferred when required to the borrower's premises, and it was held as a fact that the crane-owner had parted with the general power of controlling the craneman, and that he was not liable. All these cases, where a man is in two employments, involve very delicate considerations when a discrimination has to be made between them.

I arrive at the same conclusion here as the Court of Appeal in Ireland, but in doing so I do not feel that I am casting any reflection on the case of *Donovan* v. *Laing* (1) or the decision of the eminent Judges who pronounced it.

I think the appeal should be dismissed.

LORD DUNEDIN:—

My Lords, the question raised in this case, and the only question that can be raised, is whether, in view of the findings of the jury, a verdict can properly be entered in favour of the plaintiff. The facts out of which the action arose are of the most simple. The defendants are the proprietors of a harbour with quays to which vessels repair to take in or discharge cargo. As part of the plant of the harbour and quays there are travelling cranes

(1) [1893] 1 Q. B. 629.

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which, travelling on rails, can be moved from place to place so as to serve in the loading and unloading of vessels lying at the quays. These cranes, which are actuated by steam power, are managed and worked by men in the service of the defendants. Persons, *i.e.*, shipowners or stevedores, wishing the use of a crane, fill up an application form, which contains a request to be allowed the use of a crane of a specified size for use in connexion with a certain vessel for the purpose of unloading or loading, as the case may be, a specified cargo, "subject to the usual rates and regulations relating to the said crane." It contains a stipulation that the hirer shall be liable for all loss and damage arising from an improper use of the crane, and it specifies what the crane is engaged by, *i.e.*, either time or weight.

Upon the presentation of this application form and a deposit being made, the applicant obtains an order or authorization addressed to the crane-keeper, giving him the use of the crane, and armed with this he gets the use of the crane and the attendant man.

The above-mentioned ordinary procedure was gone through by one Chambers, the owner of three small sloops which were being discharged and one of which was called the "Busy Bee." During the discharging of the "Busy Bee" the craneman lowered the bucket rapidly and (as was attested by the jury) negligently, and struck and injured a seaman on board the "Busy Bee" who was helping to unload the cargo. This seaman, the plaintiff, raised an action against the Belfast Commissioners.

Now, the actual doer of the injury was Duffy, the craneman. The Commissioners can, therefore, only be liable upon the maxim *respondeat superior*. The sole question, therefore, is, were the defendants Duffy's "superior" on that occasion, or, in other words, was Duffy their servant?

The appellants really rested their case upon precedent only. They said the matter was concluded by the case of *Donovan* v. *Laing* (1), that *Donovan* v. *Laing* (1) was rightly decided, and established the "principle" given effect to in *Rourke* v. *White Moss Colliery Co.* (2) and many other cases; and that the present

(1) [1893] Q. B. 629. (2) 2 C. P. D. 205.

judgment could not stand unless your Lordships in this House were prepared to hold that *Donovan* v. *Laing* (1) was wrongly decided, and the "principle" therein involved erroneous.

My Lords, I entirely demur to this manner of treating the case. There is no principle involved in *Donovan's Case* (1) or in this case, except the principle which I have already mentioned, which is compendiously described by the brocard *respondeat superior*, and as to which no one entertains any doubt. The application of that principle to each particular case depends upon facts, and is a question of fact, and the facts of one case can never rule another, and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision.

Now we come to the question of whose servant was Duffy on the present occasion. Now, that he was what has been called the "general" servant of the defendant, no one doubts. They gave him his orders every morning, paid him his wages, and could at any moment have dismissed him, and told him to leave his crane and the harbour premises. This, however, though uncontroverted, is not conclusive. As Lord Watson said in this House, in the case of *The Union Steamship Company* v. *Claridge* (2), "That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service, and is paid by him, is a rule recognized by a series of decisions." And then he adds: "It is possible that in some cases questions of nicety might arise in the application of the rule to the facts."

Was this the case when, in Lord Watson's words, the servant of A. became the servant of B.? That is the question that was really before the jury. Now, I agree that the precise form of the question, as put, was not very happy. On the other hand, I think we had an intelligible and satisfactory account from the learned counsel who was at the trial, of how the question came to be put in that form. But as it stands it is: "Had the hirer authority to control Duffy otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets?" and the answer was, "No."

(1) [1893] 1 Q. B. 629. (2) [1894] A. C. 185.

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Now, I read that as meaning, and I think it was intended to mean, that the general authority and control of the defendants over Duffy had not, *pro hac vice*, been surrendered by them, and transferred to Chambers, but that the control given to Chambers was limited to the right to give directions to move the crane alongside the hold, and to lower or raise the bucket. Any control, however limited, is not, *per se*, enough to transfer the service, and the jury has not held this control to be sufficient so to transfer it.

Now that is, I think, sufficient, and indeed, is all that is strictly relevant to the decision of this case. But I will say a word or two more as to *Donovan's Case* (1). I do not think it at all necessary to make up my mind conclusively as to whether on the facts I should have come to the same conclusion as the learned Judges did. I rather think I should. But it is very clear that the facts were easily distinguishable from the present case. There the crane and attendant man were lent (I agree that hiring would have made no difference) to the users, and were transferred totally to the borrowers' premises. For the time being the lenders had relinquished all control over the man who worked the machine. Here, I think, and the jury thought, otherwise. And if similarity of facts were a test—which, as I have already said, is, I think, fallacious—then the case of *Cairns* v. *Clyde Navigation Trustees*, decided by the Second Division of the Court of Session (2), is a case more on all fours with the present than *Donovan's Case* (1). I refer to Lord Trayner's judgment in that case, with which I entirely agree. I should wish to add that the authority of that case is in no sense impaired by the subsequent case in the same Division of *McFall* v. *Adams & Co.* (3). They approved of *Donovan's Case* (1); they equally approved of *Cairns' Case* (2); and the way in which they distinguished the two was clearly pointed out by the Lord Justice Clerk, who was a party to both judgments, in his opinion at page 371.

There is, indeed, an expression of Lord Justice Bowen, which, if pressed to the full, might support the appellants' argument:

(1) [1893] 1 Q. B. 629.
(2) 25 Rettie, 1021.
(3) [1907] S. C. 367.

"We have only to consider in whose employment the man was at the time the acts complained of were done, *in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.*"

That would come to this: that any contract, however limited, provided it was absolute as far as it went, was enough to transfer the service. But what, then, of the carriage cases, the right decision of which no one disputes? I absolutely refuse to subscribe to the dictum of the same learned Judge, that these cases have no application. In the sense I have explained, in which no one case on its facts can have application to another case with its facts, that is true. But otherwise I see no reason for rejecting them. Take the case of the hire of a carriage from a job-master. The hirer can tell the coachman to go on, to stop, to go to a certain place. He can tell him to drive slower or faster within certain limits. All this control of the servant has been surrendered and transferred by the "general" master, the job-master. But he cannot tell the coachman to drive at a speed which involves danger to the horses or the carriage; he cannot tell him to leave the box and allow the horses to be driven by the hirer himself, or someone else of his selection. So here the hirer could tell the crane-man to lower or raise, or to move the crane alongside; he could not tell him to put a weight on the crane more than it would bear, or to drive it so fast as to endanger the machinery; or to descend from the crane, and let the hirer, or one of his men, work the crane instead of him. What difference in quality is there between these two sets of allowable and unallowable acts? I confess I see none, and the learned counsel for the appellants were utterly unable to suggest any.

There is no magic in the word "carriage." Although the cases referred to were cases where the service was held not to be transferred, it is easy to figure cases where the result would be different. Suppose I hire a carriage and driver for the year from the job-master, and the coachman lives at my house, and is entirely at my disposal, although still actually receiving wages from the job-master, it is, to say the least of it, quite conceivable that on such facts it might be held the coachman, if he ran over anyone in the street, was in so doing my servant. But that, as in all other cases,

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would depend on its own facts. This case depends on its facts, just as *Donovan's Case* (1) and *Cairns' Case* (2) did on their facts. And the facts in this case, as found by the jury, are supportable, in my opinion, on the evidence, and negative transference.

I have quoted one sentence of Lord Justice Bowen. I prefer one he used on another occasion, in the case of *Moore* v. *Palmer* (3): "The great test was this, whether the servant was transferred or only the use and benefit of his work." And this test must be applied, in my opinion, to the whole facts of the case. I think this case, upon the facts found by the jury, falls within the latter of the two alternatives.

I am, therefore, of opinion that the appeal should be dismissed, and the judgment affirmed.

Lord James of Hereford:—

My Lords, I had prepared a written judgment in this case: but, as I have listened to the three judgments already delivered, I find that if I were to read that judgment I should be repeating for the fourth time what has already been submitted to your Lordships' House. I, therefore, content myself with saying that I entirely agree in the view that the matters involved in this case represent a question of fact only, and there is no question of law except that which has been referred to in the judgment of my noble and learned friend Lord Dunedin—the question of the responsibility of a master for the negligence of his servant, which, of course, is admitted.

Now, my Lords, on the facts of the case, I come to the conclusion that the servant, who committed the act of negligence which caused the injury complained of, was still within the general employment and the actual employment in the course of which the injury was sustained, and that no contract between the Harbour Commissioners and the hirer has in any way removed the servant from such employment so as to cause the Harbour Commissioners not to be liable.

(1) [1893] 1 Q. B. 629. (2) 25 Rettie, 1021.
(3) 2 Times L. R. 761.

My Lords, I equally agree that this being a question of fact it must be determined as in each case every question of fact must be determined. You cannot urge, either through counsel or by the direction of the Judge, one jury to be guided in its verdict by the verdict of another jury. That would, of course, reduce the administration of justice to an absurdity. The facts of each case must be the guide in arriving at what the verdict should be; and I confess I read the verdict which the jury delivered, inapt as it is, in answer to Question No. 1, as either finding or intending to find that the Harbour Commissioners remained liable for the acts of their servant.

My Lords, still in full concurrence, I may add that in taking the course of advising that this appeal should be dismissed, your Lordships will not be, in my view, overruling any judgment delivered in *Donovan* v. *Laing* (1). The facts of that case and the facts of this case need not be compared. Whatever was the finding on the question of fact in that case, the responsibility of determining this case by the facts of it must still rest upon your Lordships; and, accepting that responsibility, my view is that this appeal should be dismissed.

Questions put—

That the order appealed from be reversed.

The Non-Contents have it.

That this appeal be dismissed with costs.

The Contents have it.

Solicitors for the appellants: *Parker, Garrett, Holman, & Howden*, agents for *Edward Bates.*

Solicitors for the respondent: *Watson, Sons, & Room*, agents for *Edward Cooksey.*

(1) [1893] 1 Q. B. 629.

K. B. Div. 1911.

Jan. 31. Feb. 1, 14.

THE KING (AT THE PROSECUTION OF GERALD CLOHERTY) *v.* THE COUNTY COUNCIL OF THE COUNTY OF GALWAY (1).

Local Government—Expenses incurred by Clerk of Crown and Peace in printing and advertising—"County purposes" in section 142 of Grand Jury Act (6 & 7 Wm. 4, c. 116)—Liability of County Council to provide for printing and advertising for county purposes.

The expenses incurred by the Clerk of the Crown and Peace in—(1) Printing lists of Quarter Sessions; (2) advertising dates of Quarter Sessions; (3) printing licensing applications; (4) advertising appointments of civil-bill officers; (5) advertising criminal injuries; and (6) printing lists of civil-bill appeals to Judges of Assize—are expenses fallingwithin the meaning of the words —"other printing required under the provisions of this Act, or which may be ordered by the Judge of Assize or Grand Jury, or Presentment Sessions for any county purpose" contained in section 142 of the Grand Jury Act (6 & 7 Wm. 4, c. 116), which were properly presentable to and payable by the Grand Jury, and, therefore, such expenses must now be provided for in their estimates and paid by the county councils, to whom the liability in respect thereof has been transferred by the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37).

MOTION to make absolute conditional order for mandamus.

The facts of the case are completely set forth in the prosecutor's affidavit grounding the application for the conditional order. The following is a copy :—

"I, Gerald Cloherty, of Foster Park, Galway, in the County of Galway, Clerk of the Crown and Peace for the said County, make oath, and say as follows :—

"1. From records in my possession, I believe that, prior to the passing of the Local Government Act, 1898, various charges for printing and advertising in connexion with the department of the Clerk of the Crown and Peace for the County of Galway, were charges which were presentable for, and payable, by the Grand Jury of the County of the Town of Galway; and the said Grand Jury at all times made presentments and paid for the same with

(1) Before LORD O'BRIEN, L.C.J., MADDEN and WRIGHT, JJ.

moneys levied off the said County of the Town of Galway. These charges included—(1) Expenses of advertising criminal injuries; (2) printing lists of Quarter Sessions; (3) advertising dates of Quarter Sessions; (4) printing lists of licensing applications; (5) advertising for appointments of Civil Bill officers; (6) printing lists of appeals.

"2. I beg to refer to the County Officers and Courts (Ireland) Act, 1877, section 20, sub-section (3), which provided that "after the union of the offices of Clerk of the Crown and Clerk of the Peace for any county or borough, no further moneys, except any special pensions payable under this Act, shall be presented or paid in such county or borough for or in respect of the salaries or remuneration of the Clerk or temporary Clerk of the Crown or of the Clerk or temporary Clerk of the Peace; but, notwithstanding the union of the offices of Clerk of the Crown and Clerk of the Peace, and both before and after such union all sums now presentable or payable, other than such salaries or remuneration, shall continue to be presented and paid in the same manner as heretofore."

"3. By section 4 (1) of the Local Government (Ireland) Act, 1898, there were transferred from the Grand Jury to the County Council all the business theretofore discharged by the Grand Jury and County-at-large Presentment Sessions; and provision was made in the said Act (section 72) for empowering the County Council to discharge all the duties thus transferred, and (section 45) to raise money to defray the expenses incurred in performing these duties; and by the Application of Enactments Order (22nd December, 1898) all debts and liabilities of the Grand Jury incurred for county purposes became debts and liabilities of the County Councils. Under this provision, the business of the Grand Jury of the County of the Town of Galway was transferred to the County Council of the county of Galway.

"4. Since the passing of the Local Government Act, 1898, down to the 1st day of October, 1909, the said County Council of Galway, acting under the authority of the said Act, regularly paid for the said printing and advertising. The advertising was paid for in the ordinary course, and the printing was included in the County Council general contract for printing each year.

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THE KING (COLHERTY) v. GALWAY CO. COUNCIL.

"During the latter part of the year 1909, I heard that the said County Council had raised an objection to the payment aforesaid; and, accordingly, on the 17th September, 1909, I wrote to the Secretary to the Council asking for information as to whether the Council would provide for printing in connexion with my office, as usual; and on the same day I received a reply that the county contract for general printing, as and from the 1st October, 1909, did not include printing in connexion with my office, but that the printing referred to was included in the contract then running, which expired at the end of September, 1909. On the 30th September, 1909, I wrote to the said secretary asking whether the Council would have the necessary printing done for the then coming sessions without prejudice to the general situation, and stating that if the Council refused to do so I was advised to make other arrangements for its execution, the adoption of this course being without prejudice to charging the Council with the cost of the work. I received a reply, dated the 30th October, 1909, stating that there was nothing at the present time in the contract under which the printing could be done, and that the Council would not meet until 17th November, and it was obviously impossible to say whether they would consent to the special arrangement. In consequence of the attitude of the said County Council towards the payment of the said charges, I was obliged to get said printing and advertising done on my own responsibility and at my own cost.

"5. I wrote again on the 16th June, 1910, to the said secretary with reference to the printing and advertising charges, and asked to be informed whether the Council would now continue to make payment for all the necessary printing and advertising carried out by me since last payment made, and whether provision would be made by the Council for all such work to be done.

"On the 30th September, 1910, I received a reply informing me that the County Council saw no reason to depart from the decision already arrived at, and intimating that the Council would reconsider the matter if I could refer them to any statute casting upon them the liability for the printing referred to. On the 15th October, 1910, I forwarded to the County Council detailed accounts with particulars of the work I was obliged to get done in the

discharge of my duties as Clerk of the Crown and Peace for the County of Galway, since 1st October, 1909, amounting in the aggregate to £28 13*s.* 1*d.*; and I requested that the Council would make immediate provision for the payment of same. On November 8th, 1910, I received an acknowledgment of my letter, and a further request for particulars of any statute casting on the Council the liability for the printing in question. On the 12th November, 1910, I wrote to the said secretary stating that I interpreted his letter of the 8th instant as a refusal to pay the costs of the said printing and advertising, and that I must take such action as I might be advised.

"I beg to refer to said correspondence, tied up in a bundle marked 'A,' and to copies of said accounts forwarded by me to the County Council on the 15th day of October, 1910, tied up in a bundle marked 'B,' upon which, respectively, I have endorsed my name previous to swearing of this affidavit.

"6. The printing and advertising specified in the said several accounts were done and inserted under the several Acts of Parliament hereinafter respectively set forth:—

ITEMS.	ACT OF PARLIAMENT.
1. Printing of Lists of Quarter Sessions.	Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. cap. 57), sec. 21.
2. Advertising dates of Quarter Sessions.	Same.
3. Printing of Licensing Applications.	Licensing (Ireland) Act, 1833 (3 & 4 Wm. 4, cap. 68), sect. 2.
4. Advertising appointments of Civil Bill Officers.	Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. cap. 57), sect. 16.
5. Advertising of Criminal Injuries.	Local Government (Ireland) Act, 1898 (61 & 62 Vict. cap. 37), sect. 5, and County Court Rules, 22nd March, 1899.

"The said accounts also contain items for the printing of the lists of Civil Bill Appeals to the Judges of Assize, which were invariably presented for and paid by the Grand Juries and by the County Councils down to the 1st October, 1909.

"7. I therefore pray that a writ of mandamus do issue to the said County Council, commanding them, according to their

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authority and duty in that behalf, to make all due and necessary provision for the payment to the Clerk of the Crown and Peace for the County of Galway, of the sum of £28 13*s.* 1*d.*, being the amount of expenses incurred by the said Clerk of the Crown and Peace in printing and advertising in pursuance of the Acts of Parliament aforesaid."

The Attorney-General (*The Right Hon. Redmond Barry, K.C.*), with him *The Solicitor-General* (*Charles A. O'Connor, K.C.*), and *John Linehan*, for the prosecutor :—

4 Geo. 4, c. 43, first fixed the salaries that were to be paid to Clerks of the Crown and Peace, and these were stated as salaries to cover all expenses; but that statute was superseded by the Grand Jury Act (6 & 7 Wm. 4, c. 116), section 110 of which Act specifically provides for the salaries. The following statutes authorize the payment of the items under discussion here :— 13 & 14 Vict. c. 69, sect. 70; 14 & 15 Vict. c. 57, sect. 155; 27 & 28 Vict. c. 99, sect. 11; 34 & 35 Vict. c. 65, sect. 16; 45 & 46 Vict. c. 49, sect. 34 (2). All the items disputed pre-existed in 1877, at the passing of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). There was a general authority under section 142 of the Grand Jury Act, to present for and pay such items; and this had been the practice for more than forty years, approved of by the Judges themselves, when the County Officers and Courts (Ireland) Act, 1877, was passed; and the concluding words of section 20 (3) of this Act provide that all sums now presentable or payable, other than the excepted salaries, shall continue to be presented and paid in the same manner as heretofore. Even if there were no section, where you have a settled practice carried on by the nation, with the sanction of the courts, it must be assumed that Parliament was aware of that practice when it passed the Act of 1877 : *Yewens* v. *Noakes* (1). [Counsel also referred to *London Co. Council* v. *Metropolitan Gas Co.* (2); *Duke of Buccleuch* v. *Metropolitan Board of Works* (3); Maxwell on Statutes (3rd ed.), pp. 32, 459, 460; Beale's Rules of Legal Interpretation, p. 369.]

(1) 6 Q. B. D. 530. (2) [1904] 1 Ch. 76.
(3) L. R. 5 Ex. 221.

Serjeant O'Brien, K.C., *Clancy, K.C.*, and *Butler*, for the Galway County Council:—

Under the Grand Jury Act no presentment could be made for anything except what the statute itself prescribed. The presentment made for items like those in dispute, was not a presentment in law. Printing is not mentioned in these Acts. You must have an enactment in express terms, or by necessary implication, concerning these particular items. We rely strongly on section 15 of the County Officers and Courts (Ireland) Act, 1877. [Counsel referred to *Attorney-General* v. *Great Eastern Railway Co.* (1).]

The Solicitor-General, in reply:—

Section 142 of the Grand Jury Act provides that presentments shall be made for payment of certain printing, and the section proceeds:—"Or which may be ordered by the Judge of Assize or Grand Jury or Presentment Sessions for *any county purpose*." "County purpose" covers the items here; they are incurred by a county officer in his capacity as such. This fits in with sect. 20 of the County Officers and Courts Act, 1877; and what was before merely presentable is now mandatorily presentable.

The judgment of the Court was delivered by WRIGHT, J.:— Feb. 14.

This is an application by the Crown at the prosecution of Mr. Gerald Cloherty, Clerk of the Crown and Peace for the county of Galway, for a writ of mandamus directed to the County Council of the county of Galway, commanding them to make due and necessary provisions for the payment to him as such Clerk of the Crown and Peace for said county of several specified sums, amounting in all to the sum of £28 0*s.* 7*d.* The items making up this amount are six in number, and are set out in the notice of motion and in the sixth paragraph of Mr. Cloherty's affidavit filed in support of the application. They are as follows:—

1. Printing lists of Quarter Sessions for posting; amount of expenses incurred, £1 8*s.*

2. Advertising dates of Quarter Sessions; amount, £5 16*s.*

3. Printing lists of applicants for licenses; amount, £7 15*s.*

(1) 5 A. C. 473, at p. 481.

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4. Advertising appointments and removals of civil-bill officers; amount, £6 1*s.* 7*d.*

5. Printing lists of notices of applications for compensation for criminal injuries; amount, 5*s.*

6. Printing lists of civil-bill appeals to the Judges of Assizes; amount, £6 15*s.*

The facts as to the payments of these charges in the past are undisputed; they are stated in Mr. Cloherty's affidavit, in paragraph 1 of which he says in effect that the records in his possession show that prior to the passing of the Local Government Act, 1898, these several charges were presentable for and payable by the Grand Jury of the county of the town of Galway, and that the said Grand Jury at all times made presentments and paid for same with moneys levied off the said county of the town of Galway and that since the passing of the Local Government Act, 1898, and down to the 1st October, 1909, the County Council of Galway, acting under the authority of that Act, regularly paid for the said printing and advertising, the county of the town of Galway having ceased to exist as a separate entity, and the business and the liabilities of the Grand Jury of the county of the town of Galway having, under the Local Government Act, been transferred to the County Council of the county of Galway. This general and comprehensive statement as to the presentment and payment of these charges in the past stands uncontradicted and obviously cannot be contradicted. It is made by a county official, evidenced by the county records in his custody. In September, 1909, for the first time, the County Council raised a question as to the liability of the county to pay these items, and eventually, after some correspondence between their secretary and Mr. Cloherty, they refused to pay, with the result that the present application to this Court has been rendered necessary.

These six items which form the subject of this application, appear to rest on the same basis, and the same considerations appear to apply to them. In the arguments on both sides they were so dealt with. As regards one of them, namely, the claim for expenses of preparing lists of claims for compensation for malicious injuries, some further and additional considerations arise.

I proceed now to refer to the statutes dealing with the several claims. By the 14 & 15 Vict. c. 57, the Civil Bill Courts (Ir.) Act, 1851, section 21, the times for holding the four Quarter Sessions in the year are to be fixed by the Chairman, now the County Court Judge, and due notice is to be posted by the Clerk of the Peace of holding such sessions; lists of Quarter Sessions fixtures are printed and posted, and the date of holding same are publicly notified. This is apparently the general practice in all the counties in Ireland, and it is for the expenses so incurred that the first two items now in dispute, namely, £1 8*s.* and £5 16*s.*, are claimed. By section 16 of the same Act, 14 & 15 Vict. c. 57, it is enacted that the name and place of abode of all process-servers appointed by the Chairman, and also the name and place of abode of every person removed from the office of process-server, shall be published in a newspaper or newspapers published in the county or riding, and shall be otherwise promulgated and made known in such manner and at such times as to the Chairman shall seem expedient. For the expense incurred in performing this statutory duty the sum of £6 1*s.* 7*d.* is claimed (fourth item). The Act of the 3 & 4 Wm. 4, c. 68, sect. 2, provides that every applicant for a spirit licence shall give notice of application to (among others) the Clerk of the Peace, and the Clerk of the Peace is required to make out a list of the names and places of abode of all such applicants, and the situation and description of the house for which the licence is sought, and transmit a copy of such list to each one of the magistrates as well as to the several Petty Sessions Clerks. For the expenses of printing such lists the sum of £7 15*s.* is claimed (third item).

For the expenses of printing lists of notices of applications for compensation for criminal injuries a sum of 5*s.* is claimed. These claims were originally brought under the old Grand Jury Act, 6 & 7 Wm. 4, c. 116, sect. 135; they came before the presentment sessions and the grand jury, and were fiated by the Judge of Assize. Now, by sect. 5 of the Local Government Act of 1898, the business of presentment sessions and grand jury, as regards compensation for malicious injuries, has been transferred to the County Court. The sixth and last item is the sum of £6 15*s.*, expenses incurred in printing lists of civil-bill appeals from the County

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Court Judge of the county of Galway to the Judges of Assize. This item, according to Mr. Cloherty's affidavit, was invariably presented for and paid by the grand juries and by the county councils down to the 1st October, 1909; and not only as to this item, but as to all the six, the fact is undisputed, as I have already shown, that they were presented for and paid by the grand juries and afterwards by the county council down to that date, namely, October, 1909.

These presentments were made by the grand juries under the old Grand Jury Act, 6 & 7 Wm. 4, c. 116, to two or three sections of which I wish particularly to refer. By section 1 all presentments are to be made under the authority and by virtue of that Act. By section 142 the grand jury is empowered to present at each Assizes such sum to be levied off the county as shall be necessary to defray the expenses of printing and distributing copies of presentments, the expense of printing the treasurer's accounts, all copies of schedules of applications, "and other printing required under the provisions of this Act, or which may be ordered by the Judge of Assize or Grand Jury, or presentment sessions *for any county purpose.*" The concluding part of section 142 is of a most general and comprehensive character.

Under this Act, from 1837 down to the present time (until the question was raised in this case), the several classes of items now under discussion have always been presented for by grand juries, fiated by Judges of Assize, and paid for by money levied off the county; and when one looks at the character and nature of the items, it will be seen that they are matters arising in the county, affecting the rights of or imposing liabilities on persons resident in the county, to be considered and determined in the county, whether by magistrates, presenting sessions, grand juries, County Courts, or Assize Courts, they are essentially county matters, and matters in which persons resident in the county are interested, and as to which officially prepared and published lists would be essential, and they, in my opinion, come within the concluding general words just quoted of section 142.

Having regard (1) to the nature of these charges, and (2) to this long-standing usage, judicially recognized and sanctioned,

I consider it would be impossible now to re-open this question of liability, unless subsequent legislation has made a change.

It, therefore, becomes necessary to consider the two later public general statutes, the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), and the Local Government (Ireland) Act, 1898.

Under the Grand Jury Act, 6 & 7 Wm. 4, c. 116, the Clerks of the Crown and Clerks of the Peace of the several counties in Ireland were county officers; they were paid annual salaries, at the rates fixed in Schedule 5 to the Act; their salaries were presented for by the grand jury at each assizes, the amounts to be raised off the county at large (section 110). They received in addition fees of various kinds, and under various heads, some under statute, some, and probably the majority, resting upon custom; but, whatever may have been the origin or basis of the claim to fees, a large portion of their emoluments was undoubtedly derived from this source.

This state of things existing in 1836 (6 & 7 Wm. 4, c. 116) subsisted down to 1877, when a change was made by the 40 & 41 Vict. c. 56 (The County Officers and Courts (Ireland) Act, 1877). By that Act the two offices, Clerk of the Crown and Clerk of the Peace, were, when the opportunity arose, united in the one person, and the salaries were made payable by the Treasury at the scale specified in the schedule to the Act out of funds from time to time provided by Parliament, and the Treasury became entitled to receive the fees formerly payable to such officers (under section 21), and no further moneys were to be presented or paid in any county or borough for their salaries (section 20 (3)). The Treasury might also, under section 15, make an annual or other allowance to any officer, existing or to be appointed under that Act, for office expenses, to defray the expense of necessary clerical assistance, postage, books, stationery, and other requisites of their office; it is clear, not merely from the absence of any express mention of printing, but also from the general nature of this section, that this cannot be read to include printing and posting through the county of notices such as these now under discussion. But then comes the important proviso in section 20 (3) that notwithstanding the union of the offices, "and both before

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and after such union all such sums now presentable and payable, other than such salaries and remuneration, shall continue to be presented and paid in the same manner as heretofore." This enactment, as clearly as words could do, preserves and stereotypes the practice then existing as to all presentments and payments made by grand juries (except as to salaries of Clerks of the Crown and Peace), and, accordingly, the old state of things continued, and the six several items always presented for prior to 1877 continued to be presented for and paid, without question or objection, down to 1898.

By the Local Government (Ireland) Act, 1898, all the business of the grand jury in each county (subject to certain exceptions) and all the business of the county at large presentment sessions were (by section 4) transferred to the county council of such county, and the business of presentment sessions and grand jury in relation to compensation for criminal injuries was (by section 5) transferred to the County Court. The change thus made is, as regards applications for compensation for criminal injuries, a change of the tribunal that is to hear and determine the claim, no longer the grand jury, but a legal tribunal, the County Court Judge. The claim, if established, results in a decree against the county council, which must be raised and levied by them off a specified area, whether the county at large or any lesser area within the county. The liability of the ratepayers remains untouched, and the amount of these decrees for malicious injuries is a matter to be annually taken into account by the county council when making estimates for the coming year, and by the Rules made under the Act (Rule 11) it is the duty of the Clerk of the Peace to publish a list of notices of application for compensation for criminal injuries, in one or more of the papers circulating in the division, three clear days before the commencement of the sessions for the division.

Several reported cases have been cited to us, but I do not discuss them. They do not appear to me to be relevant, and I do not think it necessary to rest our decision on any of them.

Having regard to the nature of these charges, and the objects for which they have been incurred, to the continuous length of time during which they have been presented and paid by the

counties, and judicially sanctioned, and to the language of the several statutes already referred to, and particularly section 142 of 6 & 7 Wm. 4, c. 116, and section 20 (3) of the 40 & 41 Vict. c. 56, we are clearly of opinion that these charges must continue to be met by the county council, and that the conditional order for a writ of mandamus must be made absolute with costs.

Solicitor for Mr. Cloherty: *Malachy Kelly.*

Solicitor for the Galway County Council: *John Kilkelly.*

J. M.

COYLE *v.* BARNHILL(1).

Appeal. 1910. Nov. 10.

Parliamentary franchise—13 & 14 *Vict. c.* 69 (*Parliamentary Voters (Ireland) Act*, 1850), *s.* 2—£20 *freehold franchise in counties.*

The £20 freehold franchise in counties has not been extinguished by the 13 & 14 Vict. c. 69, and still exists.

APPEAL by the objector from the decision of Mr. M'Gonigal, Assistant Revising Barrister for the County of Tyrone, retaining the name of William Wilson Barnhill on the register as a £20 freeholder in respect of lands and premises at Backfence and Greenbrae. He was duly objected to. It was admitted that for over two years past he was owner of an estate of freehold in the lands and premises, and that he was in receipt of more than £20 clear out of the same. The objection was based on the ground that there was now no such qualification for registration as a £20 freeholder (2), and the appeal was brought to test that question.

Serjeant O'Brien, *K.C.*, *A. M. Sullivan*, *K.C.*, and *Dougherty*, for the appellant:—

Section 2 of the Parliamentary Voters (Ireland) Act, 1850, established a uniform £5 freehold franchise, sweeping away all

(1) Before LORD O'BRIEN, L.C.J., and LORDS JUSTICES HOLMES and CHERRY.

(2) It was stated by counsel on both sides that the question whether a voter could register as a £20 instead of as a £5 freeholder was one of great practical importance in the work of the Revision Courts

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the earlier freehold qualifications, except as regards existing holders. By 1 Geo. 2 (Ir.), c. 9, s. 6, no freeholder under the value of £10 was to be admitted to vote unless his grant was registered with the Clerk of the Peace six months previously. This part of section 6 was repealed by 19 Geo. 2, c. 11 (Ir.), alleging as a reason that the design of the enactment, namely, to prevent multiplicity of votes, was liable to evasion by the corruption, ignorance, or negligence of the Clerk of the Peace. By the 35 Geo. 3 (Ir.), c. 29, the forty-shilling freeholder created by 33 Hen. 8 (Ir.), Sess. 2. c. 1, was dealt with. Section 30 of that Act enacted that no person should be admitted to vote by virtue of a freehold under the value of £20, unless such freehold was in his occupation, or tilled or grazed by him to the value of forty shillings, and unless he complied with the provisions as to registration. Section 34 applied to rentcharges, and provided for registration, the prescribed oath declaring that the freehold in the rentcharge was of the clear value of £20 at the least. The 10 Geo. 4, c. 8, established Revision Sessions to be held by the Assistant Barristers. It abolished all freehold qualifications under £10 a year. Section 3 provided that freeholders between £10 and £20 a year must be registered. Schedule 4 prescribes the oath to be taken by a £50 or £20 freeholder; schedule 5 that by a rentcharger, and schedule 6 that by a £10 freeholder. The £50 and £20 freehold franchises were recognized in the Reform Act, 2 & 3 Wm. 4, c. 88, section 46, Schedule C, No 4, No. 5. These were all statutes relating to procedure, and did not confer any franchise. By 4 Geo. 4, c. 55, s. 80, persons having freeholds under the yearly value of £20, subject only to quit-rent or Crown rent, or held in perpetuity, though non-resident, were empowered to register; and by 2 & 3 Wm. 4, c. 88, the £10 freehold franchise was expressly conferred if the freeholder was in occupation; but that franchise is now admittedly non-existent: *Herbert* v. *White* (1); *Sheehan* v. *Crofts* (2).

The effect of the words "in addition to those" in the 2nd section of 13 & 14 Vict. c. 69 was to preserve the rights of existing individuals, not antecedent franchises: *Charlton* v. *M'Cabe* (3).

(1) 4 Ir. Jur. (N. S.) 316. (2) 16 L. R. Ir. 145.

(3) 29 Ir. L. T. R. 23; 2 Laws. 30.

D. S. Henry, K.C., and *Babington*, for the respondent:—

Up to 1850 every statute passed in relation to the franchise recognizes the £50 and £20 freehold, not requiring occupation, as subsisting franchises. Were they then abolished by the 13 & 14 Vict. c. 69? Section 2 of that Act was not merely intended to save the rights of individual persons, but of a class who then or thereafter might in counties be entitled to register in respect of freehold franchises. The existence of these franchises has been recognized also in many cases: *Fitzgerald's Case* (1); *Fitzpatrick's Case* (2); *Dickson* v. *Carroll* (3); *Carroll* v. *Wallace* (4); *Carroll* v. *Fisher* (5); *Carroll* v. *Barry* (6); *Carroll* v. *Beggs* (7). These were cases heard before most distinguished Judges, and were argued by eminent counsel; yet never once for sixty years has the point been taken until now that the Act of 1850 absolutely destroyed these franchises.

Lord O'Brien, L.C.J.:—

The words we are concerned with, as pointed out by Mr. Serjeant O'Brien, are to be found in section 2 of the Parliamentary Voters (Ireland) Act, 1850 (13 & 14 Vict. c. 69), and are as follows:—"And be it enacted that in addition to those now qualified by law to register and vote at any election of a knight of the shire in Ireland in virtue of any qualification not requiring occupation," the franchise shall be conferred on persons seised or entitled to freehold property of the net value of £5. That is to say, there was to be an addition to those entitled to the franchise whose qualification did not require occupation, including the £20 freeholders. It was not merely the saving of individuals then registered, but the saving of a class of persons qualified to register in respect of qualifications not requiring occupation. I think it is not necessary to go beyond these words. I think the Revising Barrister was right.

(1) (1856) 6 Ir. C. L. R. 425.
(2) *Ibid.* 426.
(3) (1864) 15 Ir. C. L. R. 374.
(4) *Ibid.* 367.
(5) *Ibid.* 369.
(6) *Ibid.* 367.
(7) *Ibid.* 370.

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HOLMES, L.J. :—

I entirely concur. The case turns on the 2nd section of the Parliamentary Voters (Ireland) Act, 1850. The words of that section are as clear as can be expressed in the English language. Serjeant O'Brien, in order to succeed in his argument, must show that the words in the first few lines only refer to certain individuals living at the time the Act was passed. That would be a very straitened construction. The words refer, not to individuals, but to a class which would embrace individuals registering in future. Even if I had any doubt, my opinion would be greatly strengthened by the fact that this has been the construction acted on by Judges, Revising Barristers, and lawyers, for more than half a century, and it would be very extraordinary if, when the words are capable of this meaning, we should put another construction on them.

The decision in *Charlton* v. *M'Cabe* (1) could not have been given except for the fact that the £20 freehold franchise was then in existence.

CHERRY, L.J. :—

I concur, and have very little to add. The words "in addition to those now qualified by law to register and vote" in the section (13 & 14 Vict. c. 69, sect. 2), must clearly refer to people who were not on the register at the time of the passing of the Act. If there was merely an intention to preserve the existing rights of individuals, it appears to me that the rights of those on the register at the time would alone have been preserved. To hold that the words refer only to persons living at that time, would, I think, be a most forced construction. In my opinion they were intended to preserve the rights of the various classes of persons then entitled to the franchise. The Act creates new franchises, but is careful not to abolish the existing ones. That is the construction which has been uniformly placed upon this section by all authorities who have been called upon to interpret it. In the conclusion at which we have arrived, we are fortified

(1) 29 Ir. L. T. R. 23; 2 Laws. 30.

by the practice uniformly followed for sixty years by Judges and Revising Barristers, who have always recognized this £20 freehold franchise as still existing. It is inconceivable that the point now made, if a good one, would not have been discovered in all these years by, at all events, some one of the many keen and clever men who have applied themselves to the administration of franchise law.

Solicitor for the appellant: *H. T. Gallagher.*
Solicitor for the respondent: *Thomas Elliott.*

W. G.

Appeal.
1910.

Nov. 10.

McGUINNESS *v.* BOYLE (1).

Parliamentary franchise—£5 freeholder—Joint-tenant—Vesting order of Land Commission—Purchase under Irish Land Acts—Local Registration of Title (Ireland) Act, 1891—4 *Geo.* 4, *c.* 36, *s.* 1.

A vesting order made by the Land Commission to two persons jointly, and registered in their joint names under the Local Registration of Title (Ireland) Act, 1891, is not within section 1 of the 4 Geo. 4, c. 36, sect. 1 (2), and the joint-tenant, if his share be of sufficient value, though under £20, is entitled to be registered as a voter in respect of the £5 freehold franchise.

APPEAL by the claimant from the decision of Mr. C. F. Doyle, K.C., Assistant Revising Barrister for the County of Londonderry.

The claimant claimed to be registered as a £5 freeholder and was duly objected to.

The claimant and his sister, Anne McGuinness, bought a holding called Torhugh, of which their father (now deceased) had been yearly tenant, under the Land Purchase Acts. A vesting order was made to them in their joint names, and was registered under the Local Registration of Title Act in their joint names. The rating and value of the lands were sufficient to qualify the claimant (if otherwise entitled) to be registered as a £5 but not as a £20 freeholder.

The Revising Barrister held that the land was held under the vesting order, that the case came within 4 Geo. 4, c. 36, and he disallowed the claim.

(1) Before LORD O'BRIEN, L.C.J., and LORDS JUSTICES HOLMES and CHERRY.

(2) 4 Geo. 4, c. 36, s. 1—"It shall not be lawful to register any freehold under the yearly value of £20, held by virtue of any lease, deed, or other instrument given or executed to any persons jointly, in common, or in partnership."

Serjeant O'Brien, K.C., and *Muldoon*, for the appellant:—

The case does not come within the 4 Geo. 4, c. 36. The preamble shows the mischief which the Legislature aimed at, namely, the fraudulent multiplication of votes, manufactured fraudulently by the grantors. It never was intended to include devolution by operation of law, much less the proceedings or orders of a Court of Justice. The section only applies to a dealing *inter partes*: *Buchanan* v. *Hamilton* (1) followed in *Kelly* v. *Hanrahan* (2).

D. S. Henry, K.C., and *Bartley*, for the respondent:—

A vesting order answers not inaptly to the term "instrument" used in the section. It has the effect of a conveyance by the Land Judge: Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73), sect. 8: *Charlton* v. *M'Cabe* (3).

LORD O'BRIEN, L.C.J.:—

We have heard this case very fully argued. I have no doubt that the view I formed during the argument is right. I do not think a "vesting order" is embraced within the words in sect. 1 of 4 Geo. 4, c. 36: "or other instrument given or executed to any person or persons jointly." I think the expression "instrument" in the section means an instrument *inter partes*. On this point I hold that the appeal must be allowed.

HOLMES, L.J.:—

I am not prepared to hold that under ordinary circumstances the word "instrument" would not include a vesting order. But the ground of my decision is, that having regard to the 4 Geo. 4, c. 36, and that the mischief aimed at was the multiplying of colourable qualifications, the expression "instrument" as used in the section must mean an instrument *inter partes*. This is in accordance with the view taken by this Court in *Buchanan* v. *Hamilton* (1), that "instrument" in the section in question did not include a will.

(1) 1 Laws. 218. (2) *Ibid.* 219.
(3) 2 Laws. 30; 29 Ir. L. T. R. 23.

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McGuinness v. Boyle.

CHERRY, L.J. :—

I concur. I base my judgment altogether on the judgment of the Master of the Rolls (Sir A. M. Porter) in *Buchanan* v. *Hamilton* (1). It struck me at first as rather strange that a will should be held not to be an "instrument"; but I find that what he decided was merely that a will was not an "instrument" given or *executed to any persons* within the meaning of the section (4 Geo. 4, c. 35, sect. 1), which plainly contemplated transfers of title *inter vivos* only, and not wills.

Solicitor for the appellant: *Joseph J. Donaghy.*
Solicitor for the respondent: *James Brown.*

W. G.

(2) 1 Lawson, 218.

CLANCY AND OTHERS, APPELLANTS; THE COMMISSIONER OF VALUATION, RESPONDENT (1).

K. B. Div. 1910. Nov. 23. 1911. Jan. 30.

Poor rate—Exemption—Hereditaments used exclusively for charitable purposes—15 & 16 Vict. c. 63, s. 16—17 & 18 Vict. c. 8, s. 2.

The appellants were trustees of a Temperance Hall, built, out of moneys raised by public subscription, with the object of promoting temperance among the poor and labouring classes of the town of Sligo and neighbouring districts, and for their moral and material advancement and improvement. There was no trust deed relating to the Hall. The Hall was used as follows: a person first coming to the Hall was expected to pay an entrance fee of 1*s.*, and every person using the Hall was expected to pay 2*d.* per week, and was "put on his honour" to pay these sums if he could afford to do so; but persons of the class the Hall was intended for were not obliged to pay these sums whether they could afford them or not. More than half of the persons using the Hall paid these fees. Men playing billiards or cards, or taking a bath, were expected to pay certain small sums, but not bound to pay them even if they could afford. Most person playing billiards or cards, or taking baths, paid these sums. The sums received from the above sources were applied towards the upkeep of the Hall (which was not self-supporting), and in giving aid to persons who frequented it and were in temporary distress. There was a heavy building debt on the Hall, and to try and pay this off the trustees held occasional concerts and theatrical performances in the Hall, to which outsiders were admitted on payment for seats. The proceeds were applied in reducing the building debt.

Held, that the original object was charitable; that an exclusively charitable user would not be affected by the incidental concerts and theatrical performances, nor by small payments made by persons directly within the charitable object; but that the substantial payments made for the use of the Hall by persons not within the charitable object, made the user not exclusively charitable, and the Hall, therefore, was not exempt from assessment for poor-rate.

CASE STATED, pursuant to 23 Vict. c. 4, by the County Court Judge and Chairman of Quarter Sessions for the county of Sligo upon the hearing of an appeal under sect. 22 of the Valuation (Ireland) Act, 1852, in respect of a building known as "The

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

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Sligo Temperance Hall," appearing in the revised valuation list made and signed by the Commissioner of Valuation; the appeal being on the ground that the building was not rateable, it being used exclusively for charitable purposes. The appeal was heard at the Michaelmas Quarter Sessions, the County Court Judge being the only Justice who sat.

The material statements in the case were as follows:—

"The appellants are the trustees of the Gilhooly Memorial Temperance Hall, Sligo (hereinafter referred to as 'the Hall'), which was erected in memory of the late Dr. Gilhooly, formerly Roman Catholic Bishop of Elphin, and is situated on the south side of John Street, Sligo, opposite the Roman Catholic Cathedral.

"The Hall is a large edifice built of stone, and completed in the month of May, 1906, at a cost of about £6000. It was built out of moneys raised by public subscription (so far as it has been paid for), but a debt of about £3500 remains due for the building to the Provincial Bank, by whom same was provided, with interest at £4 per cent. per annum. The Hall is managed by the appellants, who are the trustees thereof.

"The object of building the Hall was to promote temperance among the poor and labouring classes of the town of Sligo and the surrounding districts, and for the moral and material advancement of these classes, and to improve them; and the attainment of this object was and is sought by providing amusements, recreation, and learning in the Hall in the manner hereinafter set out, and the Hall was opened for these purposes immediately after its completion. The idea of the trustees and those who built the Hall is that, by providing amusement, recreation, lectures, and learning in a well-lit, well-warmed, and comfortable hall, they will win these classes of the people from drink, and the streets and street corners, and improve them—mentally, morally, and materially.

"The way in which the Hall is used is as follows:—When a man first comes to the Hall, he is expected, and he is told that he is expected, to pay an entrance fee of one shilling; but, provided that he is of the class for whom the Hall was built, and that he will take the temperance pledge, and undertake to cultivate temperance, he is not obliged to pay this entrance fee of one

shilling, whether he can afford to do so or not. In the same way, each person using the Hall is expected, and told that he is expected, to pay the sum of two pence per week for the use of the Hall; but he is not obliged to pay this sum, whether he can afford to do so or not, provided that he is of the class that the Hall is intended for, and that he takes the temperance pledge, and undertakes to cultivate temperance. As regards the shilling entrance fee and the two pence weekly, the men using the Hall and who can afford to pay these sums are 'put upon their honour' to pay them, but no one has been or is refused admission to the use of the Hall who desires to enter and use it, even though he refuses to pay the entrance fee of one shilling or the two pence weekly or both, and even though it is known that he can afford to pay them, provided that he is of the class the Hall is for, and that he takes the pledge, and undertakes to cultivate temperance. Since the Hall was opened in 1906 more than half of those using it have paid the one shilling entrance and the two pence weekly. In the billiard-rooms, each man who plays a game of billiards is expected to pay two pence for each game, but he is not obliged to do so, even though he can afford it. In the card-room, each man who plays a game of cards is expected to pay a small sum towards the purchase of the cards which are provided, but he is not bound to pay this sum, even though he can afford to do so. Most of those playing billiards and cards do pay these sums. In the bath-room, each man who has a bath is expected to pay two pence for it, but he is not obliged to pay it. Most of those taking baths do pay the two pence. No payment is expected or taken for the use of the library and reading-room and the books and papers therein, or for the use of the ball-alley and gymnasium. In the large hall a National school is conducted on four evenings in the week, and books and school requisites are provided free. These night-schools are attended by newsboys, errand-boys, and apprentices, who work during the day, and by grown-up persons whose education has been neglected, and they are conducted by four teachers approved of by an inspector of the National Education Board, and paid by the National Education Board through one of the trustees. In one of the rooms off the entrance hall a branch of the St. Vincent de Paul Society, which is a society

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for relieving the destitute poor, is allowed to hold its weekly meetings free of charge. On every Wednesday evening lectures are given in the large hall on various subjects of interest by distinguished scientific and professional men, who come to lecture at the request of the trustees from various parts of Ireland. These lectures are free, except that on a few occasions the men who attend the Hall have been asked to give two pence or one penny each towards the expenses of the lectures, and some of these men have done so. A Gaelic class is held once a week, on Saturdays, in the large hall, and in winter classes are held for the study of Irish history and Gaelic on other evenings, and these are all free of charge. The Hall as never been, nor has any part of it ever been, let to outsiders. The building debt of £3500 and the interest thereon is a heavy obligation, and the trustees, in order to try and pay off this debt and the interest, have had five concerts in the large hall in each year since the Hall was opened; and on a few occasions the trustees, with the same object, have had theatricals in the large hall; and at these concerts and theatricals sums of two shillings and one shilling per seat, according to the seats, were charged to outsiders who do not frequent the Hall, and at some of the concerts and some of the theatricals those who frequent the Hall were let in free, and at some they were charged half-price. At one particular concert five shillings per seat was charged to outsiders. The proceeds of these concerts and theatricals were applied to reducing the building debt. No food or drink of any description is sold or supplied in the Hall or in any part of it. Fires are kept lit in all the principal rooms in winter and in cold weather. There is a band attached to the Hall which plays in temperance processions, and plays in the large hall to amuse the frequenters of it, free of charge, and there is a bandmaster, who is paid to teach the band. There is also a librarian, who is paid. The caretaker only lives on the premises.

"A substantial sum is obtained in each year from the above-mentioned sums paid for entrance fees, weekly payments, games and baths. These sums are applied in paying for the upkeep of the Hall, the wages of the caretaker, bandsman, and librarian, for newspapers, for the cleansing of the Hall, for gas, fuel, towels, and soap for the baths, and also in giving aid to men who frequent the

Hall, and who are in temporary distress. But these sums are insufficient for the upkeep of the Hall, and the Hall could not be carried on as it is but for public subscriptions.

"There is no trust-deed or instrument of trust relating to the Hall.

"I decided that said Hall is used exclusively for charitable purposes, and I ordered the respondent to forthwith alter and amend his said revised list of valuation by therein and thereby distinguishing the said tenements and hereditaments set forth and described in No. 47c in said revised list as being tenements and hereditaments used exclusively for charitable purposes, and I further ordered that the appellants and the respondent should abide their own costs of said appeal. My reasons for so deciding were that the objects for which the Hall was built, and has been and is used, appeared to me to be exclusively charitable objects, and that as it was conclusively established that the payments by the people who use the Hall were and are absolutely voluntary, and that, as the concerts and theatricals were only held in the Hall, and charged for, in order to try and pay off the building debt, it could not be said that the trustees used the Hall to make a profit, or that they made a profit within the meaning of the cases on the subject.

"On the 24th day of April, 1910, I received the notice in writing dated the 20th day of April, 1910, hereto attached, signed by the Commissioner of Valuation, requiring me pursuant to the 10th section of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, to state and sign a case setting forth the facts and grounds of my decision for the opinion of one of the Superior Courts of Law at Dublin.

"In compliance with such requisition I accordingly state this case.

"The question for the opinion of the Court is:

"Was I right in deciding that the Hall is used exclusively for charitable purposes, and in directing the respondent to distinguish the Hall in his said revised list as being a tenement and hereditament used exclusively for charitable purposes?"

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The Hon. Cecil Atkinson (with him *Robert Doyle, K.C.*), for the respondent:—

There is no trust-deed relating to the Hall. The trustees might use it for any purpose they thought fit. We do not deny that the original object for which the Hall was built was charitable; but this is not sufficient to exempt from liability to be rated. To be so exempt the premises must be used, and used exclusively, for charitable purposes: *Commissioner of Valuation* v. *O'Connell* (1). In the present case the user is not exclusively for charitable purposes. Anyone is permitted to use the Hall on payment of the entrance fee and weekly fees, although not of the class of persons for whom the Hall was originally intended, and the Hall is apparently largely used by persons not of such class. A private profit is made out of the premises by the trustees by the receipt of entrance fees, weekly fees, charges for games and baths, and by holding concerts and theatrical performances, and this is inconsistent with the user being exclusively charitable: *Guardians of Waterford Union* v. *Barton* (2); *Trustees of Mayee College* v. *Commissioner of Valuation* (3); *Rayner* v. *Drewitt* (4); *Overseers of the Savoy* v. *Art Union of London* (5). There is no obligation on the trustees to apply the moneys realized by these means to purposes of the institution. This distinguishes the case from *Pembroke U. D. C.* v. *Commissioner of Valuation* (6). Even if there was such an obligation, the receipt of this profit would prevent the user from being exclusively charitable: *Purvis* v. *Traill* (7); *R.* v. *Sterry* (8); *The Dublin Cemeteries Committee* v. *Commissioner of Valuation* (9), per Holmes, J., p. 171.

Leonard and *Clancy, K.C.*, for the appellants:—

The object for which the Hall was built, viz., to promote temperance among the poor and labouring classes, and for the moral and material advancement of these classes, and to improve

(1) [1906] 2 I. R. 79.
(2) [1896] 2 I. R. 538.
(3) I. R. 4 C. L. 438.
(4) 82 L. T. (N.S.) 718.
(5) [1896] A. C. 296.
(6) [1904] 2 I. R. 429.
(7) 3 Ex. 344.
(8) 12 A. & E. 84.
(9) [1897] 2 I. R. 157.

them, is admittedly charitable. The holding of concerts and theatricals, and providing means of amusement and recreation, are all connected with, and in furtherance of, the charitable object. When the user is mainly charitable, a mere incidental and ancillary user, though it may bring in revenue, does not *per se* take the case out of the exemption. All the moneys received by the trustees from the holding of concerts and theatricals, and from entrance fees and weekly fees, and payments in respect of games, &c., are applied towards the object of the charity, and, although there is no trust-deed, the trustees are bound so to apply them; the taking, therefore, of payments in respect of these matters does not prevent the user from being exclusively charitable: *Pembroke U. D. C.* v. *Commissioner of Valuation* (1). In *Guardians Waterford Union* v. *Barton* (2) there was no legal obligation to expend the sums received from the paying pupils of the College for educational purposes. So, in *The Cemeteries Committee* v. *Commissioner of Valuation* (3) there was no trust binding the committee to apply the profits in charity. Moreover, in that case the cemetery was carried on as a business undertaking. The dictum of Holmes, J., relied on by the respondent, cannot be considered as law, having regard to the case of *Pembroke U. D. C.* v. *Commissioner of Valuation* (1). The English cases, except any decided upon statutes containing exemptions analogous to those in our statutes, do not apply. They were decided upon the principle (afterwards held in *Mersey Docks Trustees* v. *Cameron* (4) to be erroneous), that the test was whether or not the occupation was beneficial—a test having no application to the provisions in force in this country expressly exempting premises used for charitable purposes, since beneficial occupation and charitable user are not necessarily inconsistent.

Doyle, K.C., in reply.

Cur. adv. vult.

(1) [1904] 2 I. R. 429.
(2) [1896] 2 I. R. 538
(3) [1897] 2 I. R. 157.
(4) 11 H. L. C. 443.

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PALLES, C.B.:—

The question reserved for us is whether the learned Chairman of the county of Sligo was right in determining that the purposes for which a building in the borough of Sligo, called "The Sligo Temperance Hall," were used, were exclusively charitable, so as to entitle it to be distinguished as such in the lists or tables of valuation, in pursuance of the 17 & 18 Vict. c. 8, s. 2.

I am of opinion, for the reason I shall hereafter state, that those purposes are not exclusively charitable; but as, on many of the arguments which have been presented to us, I am in favour of the trustees, there are some observations which it is fit that I should make, before I come to the particular circumstance upon which my decision against them is based.

The uniform current of authority in this country has been based (and, as I think, rightly) on the word "charitable," as used in this section, being construed in the large sense in which that word is generally used in our law—in the sense in which it has been held to be used in the Legacy Duty Act and in the Income Tax Acts—upon it not being restricted merely to the relief of poverty. Used in this general sense, we have the authority of Lord Macnaghten for describing it as "comprising four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to," Lord Macnaghten adds, "are not the less charitable, in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do, either directly or indirectly": *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1).

The second general observation I desire to make is that care is necessary in using cases, decided in England, as binding authorities upon questions of the character in issue here. Such of them as were previous to the decision of the House of Lords in *Mersey Docks Trustees* v. *Cameron* (2) were determined upon

(1) [1891] A. C. 531, at p. 583. (2) 11 H. L. C. 443.

the erroneous principle that the test of rateability was "the occupation being beneficial," a test not absolutely antagonistic to it being for a charitable purpose; and ever since that decision it has been recognized in England that, under the statute law there, there is no exemption by reason of the occupation being for a charitable purpose. Any decision, therefore, subsequent to that case, must rest upon the terms of some special Act of Parliament. Such, however, of those decisions as rest upon the user necessary to exempt from rates subject-matters identical with any of those mentioned *nominatim* in 1 & 2 Vict. c. 56, s. 63, such as "hospital," or "charity school," may be in point here, and are therefore distinctly valuable.

I may here call attention to the last words of s. 63 of 1 & 2 Vict. c. 56, which exempts from rates certain premises, including those used for charitable purposes, but qualifies the exemption in case "any *private* profit or use shall be directly derived therefrom," in which case the person deriving such profit or use is declared liable to be rated. This provision has its analogue in the proviso in s. 2 of 17 & 18 Vict. c. 8.

Coming now to the facts of this particular case, I am of opinion that the object for which the Hall was built, as stated in paragraph 6 of the special case, *viz.*, "to promote temperance amongst the poor and labouring classes, . . . and the moral and material advancement of these classes," is distinctly charitable. Indeed I did not understand the contrary to be suggested by the counsel for the Commissioner of Valuation.

The question next to be considered, and on which our decision must depend, is the actual user of the hall for the carrying out of this charitable object. We have had some argument as to (1.) The entrance fee of one shilling, and weekly fees of two pence, which have been paid by more than one-half of those using the Hall; (2.) The payment of two pence per game for billiards, a small sum for a game of cards, and two pence for a bath; (3.) The payment of two pence or a penny for attending a lecture.

All the sums, however, received under these heads are applied for the upkeep of the Hall, and in giving aid to men who frequent the hall and are in temporary distress (in itself a charitable object); and are insufficient for the upkeep of the Hall, which

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could not be carried on as it is, but for public subscriptions. Further, in my opinion there is an obligation on the trustees to apply these sums to the upkeep of the Hall. In respect of them there is not, nor can there be, any "*private* profit." Their receipt is "subsidiary" to the carrying on of the Hall; and even were they compulsory, if the user of the Hall were in itself charitable, I should be clearly of opinion that neither under the statute of 1 & 2 Vict. c. 56, nor on the general principles of the law applicable to charities, could the receipt of these sums divest the use of its charitable character. The words of Denman, J., in *Blake* v. *Mayor of London* (1), hereafter quoted, establish this.

I may also mention a case which I do not think was cited in argument, but to which my brother Gibson has referred me, *The Queen* v. *Overseers of Fulbourn* (2). The question there arose upon s. 35 of the Lunatic Asylums Act, 1853 (17 & 18 Vict. c. 97), which exempted from any increase of assessment lands or buildings acquired and used for the purposes of any asylum. An asylum had been built upon land acquired for the purpose, and of this land 20 acres were laid out as a garden, and 30 acres as a farm. The garden and farm were cultivated by gardeners assisted by the patients, and the result was a source of profit arising from the sale of produce not required for the establishment. It was held that as the primary object of the farm and garden was not to make a pecuniary profit, but to provide the inmates with sanitary occupation with a view to their cure, the case came within the section. This is a distinct authority that it does not necessarily follow that because a profit has been made by a charitable institution the premises cease to be exempt from rating. The instance given by O'Brien, J., in *The Cemeteries Committee* v. *Commissioner of Valuation* (3), of blind asylums making mats and baskets, and selling them for their support, appears to me an apt one.

The next matter I have to refer to is the concerts (of which there were five each year), and the occasional theatrical perfor-

(1) 18 Q. B. D. 445. (2) 6 B. & S. 451.
(3) [1897] 2 I. R. 157.

mances. These entertainments were held for the avowed purpose of making money towards paying off the debt incident to the building of the Hall; and to them outsiders were admitted on payment of sums of 1*s.* and 2*s.* 6*d.*, and, at one concert, of 5*s.* per seat. They were occasional only, and were held for the purpose of carrying on the Hall; and in my opinion, the main purpose, if charitable, cannot be affected by these subsidiary and incidental performances.

In *Blake* v. *The Mayor of London* (1) the question was as to the meaning of "public school" in a provision in the Income Tax Act, which directed the Commissioners to make an allowance for the duties charged on "any hospital, *public school*, or *almshouse*"; and it was held that the provision applied to a public school maintained partly by charitable endowments, and partly by fees charged for instruction; and Denman, J., in delivering judgment, said: "But an hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital." These words were approved of by Pollock, B., and Hawkins, B., in *Governors of Charterhouse School* v. *Lamargue* (2), where the question arose whether the institution was a "Charity School," within the meaning of the "Inhabited House Duty Act," on the ground that it was "in the main self-supporting," which the hall in Sligo is not.

Upon all these questions, I am consequently in favour of the trustees.

I now come to the matter upon which I feel coerced to differ from the learned County Court Judge.

The user of the Hall, as stated in the case (paragraph 8), is as follows:—

"When a man first comes to the Hall, he is expected, and he is told that he is expected, to pay an entrance fee of one shilling; but, provided that he is of the class for whom the Hall was built, and that he will take the temperance pledge, and undertake to cultivate temperance, he is not obliged to pay this entrance fee of

(1) 18 Q. B. D. 437. (2) 25 Q. B. D. 127.

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one shilling, whether he can afford to do so or not"; and the same practice is adopted in reference to the fee of two pence weekly.

I am unable to put any other construction on this paragraph than this: That the benefits of the Hall are not confined to persons who take the temperance pledge and undertake to cultivate temperance, or to the poor and labouring classes; but that the Hall is equally available for other persons, provided only they pay the entrance and weekly fees. Thus the user of the Hall is not confined to carrying out the original object of the charity, but is much more extensive; and if the actual user is not exclusively charitable, then the premises are rateable. I cannot distinguish this user from that of a club open to all—poor and rich, workingmen, and all others. Such a user is not charitable.

In re Scowcroft; *Ormod* v. *Wilkinson* (1) is distinguishable. That case arose on a devise of a building for the purpose (as construed by the Court) of "the furtherance of conservative principles and religious and mental improvement in combination." That devise was held valid, because—to use the words of Stirling, J.—"the furtherance of religious and mental improvement is, in my judgment, an essential portion of the gift." Such a case cannot have any application to the present.

If the user of the Hall by persons not within the charity had been insignificant or unsubstantial, an additional question might have arisen; but not only is this not found, but more than one-half of the persons who use the Hall pay these fees, and therefore are not, or at least may not be, within the charity. It lies upon the trustees affirmatively to bring themselves within the exemption, and as they have not done so, they must be held to be rateable.

The question must, therefore, be answered in the negative. There will be no costs.

GIBSON, J.:—

This case raises two important questions: (1) What do "charitable" and "exclusively charitable" in the valuation code mean? (2) Do the premises, used in the way described, come

(1) [1898] 2 Ch. 638.

within that meaning? The earlier English cases, decided on the statute of Elizabeth under the mistaken idea that to be rateable the occupier should have beneficial occupation, give no help, as the test is now settled to be, is there occupation? and is that occupation of value with regard to the hypothetical tenant?—*The Erith Case* (1). Hence, in England, premises occupied as board schools, industrial or reformatory schools, county council buildings used for administrative purposes, or premises used for charitable or religious objects, have been held, in the absence of special legislation exempting them, to be rateable, though no profit of any kind is derived from the occupation. The only English cases at all in point are those decided on language resembling that found in our enactments: *Reg.* v. *Fulbourn* (2); *Hall's Case* (3); *Forrest's Case* (4); *The Royal College of Music Case* (5); *The Charterhouse Case* (6); *Ormskirk Case* (7).

The Valuation Acts exempt hereditaments (1) altogether of a public nature, or (2) used exclusively for charitable, or (3) for scientific purposes. Has "charitable" here the wide meaning given to the term in *Pemsel's Case* (8), where Lord Macnaghten, adopting the classification proposed by counsel in *Morice* v. *Bishop of Durham* (9) (substituting "education" for "learning"), extends charity to the relief of the poor, the advancement of religion, of education, and objects of public utility? Purposes of this last type, unlike public purposes as a separate exempted class in the valuation code, may constitute valid charities though restricted as to locality and persons; for example, a grammar school: *Re Allen* (10); or a village reading-room: *Re Scowcroft* (11). Three of the four heads of charity above described are independent of the eleemosynary element, and, as Lord Macnaghten observes, are none the less charitable because they may incidentally benefit the rich as well as the poor. Charity must, in our Acts, include religion (which otherwise would be left out), and, in my

(1) [1893] A. C. 562.
(2) 6 B. & S. 451.
(3) 16 Q. B. D. 163.
(4) 15 App. Cas. 334.
(5) [1898] 1 Q. B. 304.
(6) 25 Q. B. D. 121.
(7) [1903] 2 K. B. 498.
(8) [1891] A. C. 531.
(9) 10 Ves., p. 531.
(10) [1905] 2 Ch. 400.
(11) [1898] 2 Ch. 638.

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opinion, the term has the wide signification given to it in *Pemsel's Case* (1). If charity has that operation for the purposes of income tax exemption (as in *Pemsel's Case* (1)) or for the purpose of legacy duty exemption (as in *Becher's Case* (2)), why should the word have a narrower reach in relation to rating? In *Coomber's Case* (3), it was held that there was no distinction as regards exemption between poor rate (for local purposes) and income tax (for imperial purposes); but there no doubt the *ratio decidendi* was, that Crown or Government occupation alone was exempt.

The word "exclusively" does not alter or restrict the meaning of "charity," whatever that meaning may be; it only prohibits the admixture or introduction of any foreign element. The user must be not mainly but altogether for the charitable object: *Forrest's Case* (4); *The Royal College of Surgeons Case* (5).

If the premises are dedicated and used for charitable purposes, their exclusively charitable character is not, I think, affected by the officers receiving salaries: *The Royal College of Music Case* (6) (though for the portion of the premises occupied by them they may be rateable); or by reason of the premises, as the ordinary direct result of charitable operations, earning some profit; as, for example, a lunatic asylum with grounds and gardens to provide useful and healthy occupation for the patients: *R.* v. *Fulbourn* (7); or a blind asylum, the inmates of which are usefully, in their own interest, taught basket-making, their work being sold for the benefit of the charity.

The primary object of the institution was, I think, charitable; it was for the moral and educational improvement of its visitors; and served a public purpose quite as much as the village hall, the subject of *Re Scowcroft* (8). It is objected that the user was not exclusively charitable on two grounds. The first is, that some concerts were held each year, and occasional dramatic performances given, with the object of raising funds to go in part discharge of the debt on the premises. I do not think that such occasional incidents

(1) [1891] A. C. 531.
(2) [1910] 2 I. R. 251.
(3) 9 App. Cas. at pp. 71, 77.
(4) 15 App. Cas. at pp. 348, 349.
(5) [1899] 1 Q. B. 871.
(6) [1898] 1 Q. B. 809.
(7) 6 B. & S. 451.
(8) [1898] 2 Ch. 638.

necessarily, and as matter of law, change or interrupt the exclusively charitable nature of the user; the premises were not let; the occupation was not disturbed. To hold that a bazaar or charity ball to get funds for a charity would, if held on the charity premises, deprive such premises of their right to exemption would appear highly unreasonable: *Whittle's Contract* (1). The Judge has found as a fact that these incidental entertainments did not alter the exclusively charitable character of the user; and if there was evidence to justify his view, we are bound by his finding. The Court cannot substitute its view for his, unless his conclusion was legally incompetent: *Coomber's Case* (2). Personally I concur with his conclusion of fact on this point.

The main objection was founded on the payments made in respect of the enjoyment of the advantages afforded by the Hall.

I do not think that payment by persons within the charitable object is necessarily inconsistent with exclusively charitable user, either in its eleemosynary or wider aspect. Much depends on amount, kind of user, and class intended to be benefited. Many besides the destitute are fit objects of charitable bounty; those who have seen better days, and shrink from any public appeal, deserve and should receive aid; and it is a wise principle to relieve without pauperising or injury to self-respect or self-reliance. Thus, in *Re Estdale* (3) a Home of Rest for lady teachers was held to be a valid charity, though 10*s.* a week was charged for board and lodging. Would not the same principle apply to Salvation Army shelters where a small nightly payment is required? In *In re Mann* (4) Farwell, J., held that the Mann Institute, founded for the benefit of the inhabitants of a district, was charitable as being for a public object, though payments were made for the use of the premises. There is, of course, an obvious distinction between the charity and the user of the premises, which may be for objects not strictly charitable. The portion of the premises so used would not be exempt. But where the payments are made directly in connection with the charitable object by the class intended to be benefited, the question is different, and I do not think that payment *per se*

(1) [1907] 2 Ch. at p. 494.
(2) 9 App. Cas. at p. 72.
(3) 72 L. J. (N.S.) Ch. 657.
(4) [1903] 2 Ch. 232.

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CLANCY, *Appellant*; COMMR. OF VALUATION, *Respondent*.

Gibson, J.

necessarily and in every case is incompatible with the user being exclusively charitable in character. The distinction is well illustrated by such a case as *Smith* v. *Kerr* (1), where it was held that Clifford's Inn was a valid charitable foundation, though plainly the occupation was not restricted to exclusively charitable objects, such occupation being rateable; whereas in *Reg.* v. *Fulbourn* (2), and in the *Home of Rest Case* (3), the occupation was strictly for the charitable object.

A more serious objection is founded on the class of visitors and kind of accommodation and attractions supplied. The payments, though not legally exigible as matter of contract, amounted to a substantial sum, and the premises were undoubtedly employed systematically and intentionally to earn money. The payments were made under moral pressure of publicity.

With regard to the poorer visitors, for whose benefit the Hall was primarily intended as an attractive substitute for the dangerous allurements of the public-house, for the reasons already indicated, I should hesitate to reverse the Judge's conclusion. But there were other visitors, belonging to a different class, who, from the nature of the advantages offered, would use the premises as a kind of cheap club and place of social meeting, intercourse, and amusement. No doubt the establishment was highly philanthropic, but was the user exclusively charitable? The premises were used partly for the purpose of getting money from persons, not of the poor class, who were under moral though not legal obligation to pay for the advantages afforded. The case appears to me more doubtful than it did during the argument, but I have with regret come to the conclusion that, on the facts found, the decision by the Court below was erroneous in law.

None of the authorities cited in argument seems in point in reference to the ground of my decision. In the *Pembroke Case* (4) the school was for a public object within the *Belfast Harbour Case* (5); even, if regarded as a charity, the small payments made by pupils directly within the charitable object would not affect

(1) [1902] 1 Ch. 775.
(2) 6 B. & S. 451.
(3) 72 L. J. (N.S.) Ch. 657.
(4) [1904] 2 I. R. 429.
(5) [1897] 2 I. R. 516.

the exclusively charitable purpose of the occupation. In *The Waterford Case* (1) Palles, C.B., expressly declined to express any opinion whether receipts from the paying pupils, if appropriated to the charity, would or would not have affected exemption. The cases of *Purvis* v. *Traill* (2) and *The Cemeteries Case* (3) only decide that the user of premises must, to confer exemption, be for charitable purposes; and that premises occupied commercially are rateable. *Reg.* v. *Sterry* (4) was based on the exploded view that rateability depended on beneficial occupation. The school there was a sectarian institution, and whether it was a valid public charity or not was not the point decided.

In my opinion, the Hall was a charitable foundation, notwithstanding the payments made by the various classes of visitors: *The Mann Case* (5); *The Charterhouse Case* (6); but the user of the occupation was not exclusively charitable, and the premises, while such user continues, are not exempt.

BOYD, J., concurred.

Solicitor for the appellant: *Michael Howley.*
Solicitor for the respondent: *W. G. Towers.*

J. G. T.

(1) [1896] 2 I. R. 538.
(2) 3 Ex. 344.
(3) [1897] 2 I. R. 157.
(4) 12 A. & E. 84.
(5) [1903] 1 Ch. 252.
(6) 25 Q. B. D., at p. 127.

Appeal.
1910.

ALLEN *v.* CARROLL (1).

Nov. 11, 14, 15. *Parliamentary franchise—Inhabitant householder—Payment of rates*—Bona fides—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3 (4)—*Urban District Council—Artizans' dwellings—Tenancy created by verbal agreement without resolution—Letting free of rates—Payment by Urban District Council—Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 52—*Landlord and tenant.*

An Urban District Council, having acquired land within their district for the purpose, erected thereon artizans' dwellings. An agent of the Council on their instructions, but without any formal resolution, let by verbal agreement one of the houses at the weekly rent of 3*s.* free of rates. In fixing the rent regard was had to the amount of rates the Council would have to pay. The payment of rates by the Council was not to be contingent on the receipt by them of the weekly rent.

The Revising Barrister having found that all rates in respect of the premises had been paid by the Council *bona fide* and in pursuance of the verbal agreement:

Held, that the tenant of the premises, who was in occupation of them during the qualifying period, was entitled to the franchise.

Bryans v. *Callaghan* (Lawson's Notes (1907), p. 241; 42 Ir. L. T. Rep. 97) approved of and followed.

APPEAL by the objector from a decision of Mr. Frederick M. Mooney, Assistant Revising Barrister for the county Armagh, over-ruling the objection and retaining the name of the respondent, John Carroll, and several other persons objected to on similar grounds, on the register.

The name of John Carroll appeared on the register for the division of Mid-Armagh as an inhabitant householder of premises 27 Banbrook Hill.

The ground of objection was, that the rates had not been paid *bona fide*" within 30 & 31 Vict. c. 102, sect. 3, sub-sect. (4).

(1) Before LORD O'BRIEN, L.C.J., and LORDS JUSTICES HOLMES and CHERRY.

James Lennon, Clerk to the Armagh Urban District Council since 1903, was examined on behalf of the objector. His evidence was as follows:—

Prior to the 20th July, 1909, the Armagh Urban District Council had acquired a property formerly known as the "Sherry property," and erected thereon artizans' dwellings, including the premises 27 Banbrook Hill. He (witness) prior to the 20th July, 1909, on the instructions of the Urban District Council (but without any formal resolution in writing authorizing him to do so), through Bernard O'Neill, a rent agent of the Council, entered into verbal agreements with, amongst others, the respondent, John Carroll, by which Carroll agreed to become tenant to the Council of the premises 27 Banbrook Hill, at a weekly rent of 3*s.* free of rates. In fixing the amount of the weekly rent, regard was had to the amount of rates which the Urban District Council would have to pay in each case. The payment of the rates by the Council was not to be contingent on the receipt by them of this weekly rent. John Carroll went into occupation of the premises prior to the 20th July, 1909, as tenant to the Council under this verbal agreement, and at the time of the Revision Sessions continued in occupation of them as such tenant. On the 31st March 1910, Carroll was 4*s.* 3*d.* in arrear with his rent. In March, 1910, Mr. Considine, Local Government Board Auditor, audited the books of the Council for the year ending the 31st March, 1909, and held on the application of dissatisfied ratepayers that the payment of rates of the artizans' dwellings (including Carroll's holding) by the Urban District Council was illegal, and surcharged certain persons responsible for payment of same. These persons appealed to the Local Government Board, who by sealed order dated the 20th June, 1910, remitted the surcharge on the ground that the subject-matter thereof "was incurred under such circumstances as to make it fair and equitable that each such disallowance and surcharge should be remitted."

On the 23rd June, 1908, the Armagh Urban District Council received a letter from the Local Government Board recommending the Council to enter into written agreements with their tenants. This letter was twice brought before, and considered by, the Council, *i.e.*, on the 8th July, 1908, and on February 7th, 1910.

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The Council determined not to act on the advice so given, and continued to let their houses, including Carroll's, by verbal agreements.

Bernard O'Neill corroborated the evidence of James Lennon as to the terms of the letting to Carroll. He also stated that the Council, in agreeing to pay the rates, were adopting and continuing a custom which had subsisted between the former owners of the Sherry property and their tenants. Lennon was also corroborated as to the terms of the letting by Patrick Grimley, the present rent agent to the Council.

It was contended before the Assistant Revising Barrister, *inter alia*, (*a*) that no legal contract to pay rates for tenants could be entered into by any agent of the Urban Council without a resolution authorizing him to do so having been passed by the Council and duly entered on their minutes; (*b*) that Mr. Lennon, in the absence of such resolution, had no power to let the houses free of rates in disregard of the occupiers' statutory liability under section 52 of the Local Government Act, 1898; (*c*) that the Council and their Clerk disregarded Article 64 (1) of the Public Bodies Order of 1904, Forms 36 and 37, in making lettings otherwise than in writing; and it was submitted that the agreement between the Council and John Carroll, and the similar agreements between them and their other tenants, were illegal and *ultra vires*, and that the payment of rates pursuant thereto could not have been made *bona fide*.

The Assistant Revising Barrister stated that he found as facts:—

First, that John Carroll occupied the premises 27 Banbrook Hill as tenant to the Armagh Urban District Council during the qualifying period.

Secondly, that no rates were due out of these premises, as such rates had been paid by the Armagh Urban District Council, on behalf of John Carroll, pursuant to a verbal agreement by Lennon, or his agent, purporting to act for, or on behalf of, the Armagh Urban District Council, with the said John Carroll.

Thirdly, that the rates had been paid by the Armagh Urban

(1) S. R. and O. (1904), p. 365.

District Council *bona fide*, and in pursuance of the verbal agreement entered into by Lennon, or the rent agent, purporting to act for, and on behalf of, the Armagh Urban District Council.

Fourthly, that, under the before-mentioned verbal agreement, the payment of rates by the Armagh Urban District Council was not contingent on the Council receiving the rent from John Carroll.

The objection to John Carroll was accordingly disallowed.

Seventy-one other cases in which the facts were similar were consolidated with that of John Carroll.

The Right Hon. J. H. Campbell, K.C., and *Calvert*, for the appellant:—

The agreement by the Urban District Council to pay rates was *ultra vires*. Under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 3 (4), to qualify a rated occupier, he must have, on or before the 20th July, *bona fide* paid an equal amount in the £ to that payable by other ordinary occupiers in respect of all poor-rates payable in respect of the premises up to the preceding 5th January (altered by 48 Vict. c. 3, s. 7 (2), to the 1st January). The rates here were not *bona fide* paid. No municipal council can take on itself to enter into such an agreement. Section 63 of the Local Government Act, 1898, giving appeals to the Local Government Board from surcharges, only applies where the surcharge itself was lawful; but in the opinion of the Board there are mitigating circumstances which would justify its remission. The words *bona fide* in section 3 of the Act of 1867 have a most important force: *Humphrey* v. *Maguire* (1); Hunt's Registration Law, p. 36; where it was held that payments of a claimant's rates by a political association, without his authority, was not a *bona fide* payment entitling the claimant to be registered; *Bennett* v. *Cairns* (2); Rogers on Elections, 17th ed., vol. 1, p. 153. Such an agreement as alleged to have been entered into here is contrary to section 52 (2) of the Local Government Act, 1898, and is illegal in the case of tenancies created after the Act came into operation. As to urban rates

(1) Laws (1890), p. 156. (2) *Ibid.*, p. 216.

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made upon occupiers of tenancies existing at the passing of the Act, see section 54 (12). As to the duties of Councils in the collection and application of rates, see section 47.

T. M. Healy, K.C., and *A. M. Sullivan, K.C.*, for the respondent:—

By the Poor Rate Assessment and Collection Act, 1869, the owner might agree with the overseers to pay the rates in certain cases, and receive a commission not exceeding 25 per cent. (section 3), and the vestry might order the owner in such cases to be rated. That Act applies only to England, but sections 7–10, 19, and definition of owner were extended to Ireland by the Representation of the People Act, 1884, s. 9 (7).

Under section 2 of the Assessed Rates Act, 1879, also extended to Ireland by the Representation of the People Act, 1884, where an allowance or deduction is made, the same shall, for the purpose of any qualification or franchise depending upon rating, or payment of rates, be deemed to have been made pursuant to every or any agreement, order, notice, or proceeding necessary for the validity thereof under the Poor Rate Assessment and Collection Act, 1869. "*Bona fide* payment" of the rates in section 3 of the 30 & 31 Vict. c. 102, was intended to exclude the corrupt payments referred to in section 49, and thereby made punishable as bribery.

The present case is really concluded by the decision of this Court in *Bryans* v. *Callaghan* (1). There the selfsame question was raised on the same contract with regard to the same premises, and this Court held that the contract was lawful, and that payment of rates under it was made *bona fide*, entitling the tenants to votes.

As to the lettings having been made verbally, and without any previous resolution of the Urban District Council, see definition of "owner," Poor Rates Assessment and Collection Act, 1869, sect. 20, extended to Ireland by the Representation of the People Act, 1884, sect. 9 (7); *Glenn* v. *Brennan* (2). A legal infirmity in the contract of tenancy will not deprive an inhabitant householder,

(1) Laws. (1907), p. 241; 42 Ir. L. T. Rep. 97.

(2) 29 Ir. L. T. Rep. 79.

otherwise duly qualified, of the franchise. This has been recognized in an unbroken series of decisions.

Calvert, in reply:—

The tenancy in *Bryans* v. *Callaghan* (1) was created prior to 1898, when a contract by a landlord to pay rates was legal. Here the Revising Barrister has not stated when the letting was made, and it is presumably of recent origin. A weekly rented tenancy of an artizan's dwelling would scarcely continue for thirteen years. In fact, as Lennon, who made or authorized the letting, was appointed in 1903, it must have been made after 1898.

LORD O'BRIEN, L.C.J.:—

I think that there is no substantial distinction between this case and *Bryans* v. *Callaghan* (1). *Bryans* v. *Callaghan* (1) was decided by the normal full Court. I think it decides this case.

HOLMES, L.J.:—

I concur on the same grounds. In *Bryans* v. *Callaghan* (1) the Court came to the conclusion that the contract was a valid contract, and that the action of the Urban Council was correct in reference to that contract. Here we have a precisely similar contract with the same line of action taken by the Council, and it is, therefore impossible for us to come to a different conclusion in this case from what the Court arrived at in *Bryans* v. *Callaghan* (1). The only distinction suggested is the time of letting. But, even assuming that the lettings in *Bryans* v. *Callaghan* (1) were made before 1898, which was not relied on in the argument therein, I fail to see how that would make any difference in the position.

CHERRY, L.J.:—

I concur.

Solicitor for the appellant: *Joshua E. Peel.*
Solicitor for the respondent: *Patrick Lavery.*

W. G.

(1) Laws. (1907), p. 241; 42 Ir. L. T. Rep. 97.

Appeal.
1910.

Nov. 15.

GREGG *v.* KENNEDY (1).

Parliamentary franchise—Power of Revision Court to amend—Bona fide *mistake not tending to mislead—Qualifying premises inserted in list for polling district other than that in which they are situate*—48 *Vict. c.* 17, *s.* 27, *sub-s.* 1.

Where the name of a voter, otherwise duly qualified, appeared in the supplemental list of inhabitant householders for the registration unit of A, polling district of B, and the qualifying premises were situate in the same unit, polling district of C, and the Revising Barrister, being satisfied that the error arose from a *bona fide* mistake, and that no person had been thereby misled or prejudiced, transferred the name from the list for B to the list for C.

Held, that he had power to make such amendment.

APPEAL by the objector from the decision of Mr. Thomas J. Campbell, Assistant Revising Barrister for the county of Donegal.

The name of the respondent, William Kennedy, appeared on the supplemental list of inhabitant householders in the registration unit of Killea, polling district of St. Johnston, parliamentary division of East Donegal, in respect of qualifying premises in Kildrum, in succession from Tyroddy. He was duly objected to. His right to be registered was proved subject to a question of law raised by the objector on the following facts:—

Kildrum is a townland in the registration unit of Killea. Part of this registration unit is in the polling district of St. Johnston, and the rest of it in the polling district of Newtowncunningham. Both polling districts are in the parliamentary division of East Donegal. The name of William Kennedy was inserted in the right registration unit, but in the

(1) Before LORD O'BRIEN, L.C.J., and LORDS JUSTICES HOLMES and CHERRY.

wrong polling district, the qualifying premises being in fact in the polling district of Newtowncunningham.

The Assistant Revising Barrister stated that he was satisfied that the insertion of the name in the wrong polling district arose from a *bona fide* mistake on the part of the registration agent, who returned the qualifying premises as situate in the polling district of St. Johnston, to the Clerk of the Union, by whom the same were inserted by that description in the supplemental list. The Assistant Revising Barrister stated that he was satisfied that no person had been misled or prejudiced by the mistake, and he accordingly expunged the name of William Kennedy in the supplemental list of inhabitant householders, registration unit of Killea, polling district of St. Johnston, and inserted the name of William Kennedy, in the supplemental list of inhabitant householders, registration unit of Killea, polling district of Newtowncunningham. The objector contended that there was no power to make the amendment; and the question reserved was, whether there was such power.

Weir Johnston, for the appellant:—

The Revising Barrister had no power to amend this claim. It does not fall within 48 Vict. c. 17, s. 27, sub-sect. 1 (1). The mistake was caused not by the official who prepared the list, but by the claimant himself. In *Ballard* v. *Robins* (2) the mistake was that of the overseer whose duty it was to prepare the lists. In *Bollen* v. *Southall* (3), the notices conveyed the necessary information though in an informal and inaccurate manner. Lord Coleridge in that case said that the powers of amendment should not be construed so as to encourage laxity, and Stephen, J., agreed with that opinion. In *Bendle* v. *Watson* (4), Brett, J., says at p. 170, "If the inaccuracy is such as to make the descrip-

(1) "The Court shall, with respect to the lists of parliamentary voters which it is appointed to revise, perform the duties and have the powers following:—

"1. It shall correct any mistake which is proved to have been made in any list."

(2) 3 C. P. D. 92. (3) 15 Q. B. D. 461. (4) L. R. 7 C. P. 163.

Appeal. 1910.

GREGG v. KENNEDY.

tion of the qualification the description of another qualification than that which is to be proved, the evidence cannot be given which would be sufficient to enable the amendment to be made"; *aliter* if the description is insufficient only of that which is to be proved; and he says that the mistake referred to in the early part of section 40 of 6 Vict. c. 18, meant a mistake by the overseers: See *Pierce* v. *Beveridge* (1); *Short* v. *Daly* (2); *M'Intyre* v. *Black* (3); *Sharp* v. *Fottrell* (4); *Sharp* v. *M'Curry* (5); *Kenny* v. *Kenealy* (6).

Wood, for the respondents:—

Before the Local Government Act, 1898, the registration unit was the polling district—now it is the electoral division: *M'Intyre* v. *Black* (3) was decided in 1888, previously to the Local Government Act. In that case Form No. 18 was accidentally not published. In *Ballard* v. *Robins* (7), Denman, J., says at p. 95, speaking of the 40th section of 6 Vict. c. 18, that it "in substance enabled the Revising Barrister to amend 'the list,' into how many soever portions that list may for convenience be split." That was a case where the Court of Common Pleas held that the Revising Barrister ought to have amended by transferring the name of a voter from one list to another. *Sharp* v. *M'Curry* (5) was a clear authority justifying the amendment here. See concluding observations of Fitz Gibbon, L.J., p. 250.

THE COURT affirmed the decision of Mr. Campbell and dismissed the appeal.

Solicitor for the appellant; *John Elliott.*
Solicitor for the respondent: *Edward M'Fadden.*

W. G.

(1) Hunt on Registration, p. 260.
(2) Laws. (1885–1893), p. 310.
(3) *Ibid.* 300.
(4) 2 Laws. 245.
(5) *Ibid.* 247.
(6) [1895] 2 I. R. 544; 2 Laws. 34.
(7) 3 C. P. D. 92.

In the MATTER of the EARL of CLANCARTY; a Bankrupt (1).

Appeal. 1910.

Nov. 22.

Practice—Costs—Taxation—Higher scale—Instructions for brief—Proceedings in King's Bench (Bankruptcy)—Charge and discharge—"Action"—Supreme Court of Judicature (Ireland) Act, 1877, sect. 3—R. S. C. (Ir.), 1905, Order LXXXVIII., Rr. 57–64; App. S., Part I., 74, 75, Part V., 97.

For the purposes of taxation of costs, even when directed to be paid on the higher scale, proceedings in the King's Bench (Bankruptcy) by charge and discharge do not come within the definition of "action" in the 3rd section of the Judicature (Ireland) Act, 1877.

Motion on behalf of the dischargeants, in pursuance of special leave of the Court, for a declaration that on the true construction of the order herein made on the 7th day of February, 1910, the Taxing Master in taxing the costs awarded to the dischargeants by the said order should have allowed a reasonable and proper sum for the costs of instructions for briefs for the hearing of the charge and discharges herein; or in the alternative for an order that so much of the said order of the 7th February, 1910, as awarded costs to the dischargeants be varied and amended by adding to the same such special directions as to the allowance and taxation of such costs of instructions for briefs as to the Court might seem fit.

The proceedings in this case were initiated in the King's Bench Division (Bankruptcy) by a charge which was filed by the assignees in bankruptcy of the bankrupt, the Earl of Clancarty, and sought to set aside an indenture dated the 26th day of May, 1906, as fraudulent and void as against them. This indenture, which was made by the bankrupt of the first part, Adeliza, Countess of Clancarty of the second part, and Lord Francis Hervey and Thomas Francis Crozier of the third part, purported to convey

(1) Before The Lord Chancellor, and Lords Justices Holmes and Cherry.

Appeal. 1910.

In re CLANCARTY.

and assign to Lord Francis Hervey and Mr. Crozier the bankrupt's life estate, in lands of considerable value and certain sums of money, in trust to pay scheduled creditors of the bankrupt, and subject thereto to hold the residue upon trust to pay the income thereof to the bankrupt for such period as they in their discretion should see fit; or, at their absolute discretion, and without any liability to account to the bankrupt, to apply the same in and for the benefit and maintenance of himself and his wife and children. The indenture was in fact modelled on the precedent sustained by Page-Wood, V.-C., in *Holmes* v. *Penney* (1). The indenture was impeached on a variety of grounds, but principally on 10 Car. I., Sess. 2, c. 3 (Ir.). Discharges were filed by the trustees and by Adeliza, Countess Clancarty, in which the main defence was that the latter by advancing a large portion of the sum needed to pay the scheduled creditors was a *bona fide* purchaser for value.

The case was heard before Mr. Justice Boyd on oral evidence, the evidence and arguments of counsel extending over several days. A voluminous amount of documentary matter, including prolonged correspondence, was also given in evidence. His Lordship reserved judgment, and in his considered judgment, delivered on the 14th May, 1909, gave his reasons at considerable length for making the order which he did, and whereby he declared the indenture of the 26th May, 1906, fraudulent and void as against the assignees in bankruptcy.

The trustees of the indenture of 26th May, 1906, Lord Francis Hervey and Mr. Crozier, and the infant children of the bankrupt, having appealed from the order of Mr. Justice Boyd, the Court of Appeal, after a prolonged hearing, extending over several days, reversed the order.

The order of the Court of Appeal, dated the 7th February, 1910, so far as material to the present report, was as follows:—

> "It is ordered that the said order of the King's Bench Division (Bankruptcy) dated the 14th day of May, 1909, do stand discharged, and in lieu thereof, it is ordered that the charge of the said assignees, filed on the 4th day of January, 1908, and the amended charge filed on

(1) 3 K. & J. 90.

the 15th day of January, 1908, in the Court below be disallowed, and that the respondents the said assignees do pay to the appellants, Lord Francis Hervey, Francis Rawdon, Moira Crozier, and Thomas Francis Crozier, and to the said infant appellants, their costs of the charge and amended charge and of the proceedings thereunder in the Court below, and their costs (one set) of this appeal when taxed and ascertained, and it is further ordered that the said respondents to pay to the appellant Adeliza, Countess Dowager of Clancarty, her costs of the said charge and amended charge, and of the proceedings thereunder in the Court below, and of this appeal when taxed and ascertained. And it is further ordered that the Taxing Master shall tax the aforesaid costs in the Court below hereby awarded to the dischargeants on the higher scale."

The trustees and the guardian *ad litem* for the infant appellants having lodged their costs for taxation under this order, the Taxing Master (Mr. Jehu Mathews) disallowed item 185 in their costs, being a claim for instructions for brief. The appellants duly objected to the disallowance, and on the 18th July, 1910, the point was argued before the Taxing Master by counsel for the appellants, and by the solicitor for the assignees in bankruptcy, when the Taxing Master overruled the objections.

On the 3rd December, 1909, an application on behalf of the assignees was made to Mr. Justice Boyd that the costs of the hearing of the charge and discharge herein be taxed as the costs of an action, and that the Taxing Master be directed to tax the said costs on this basis. This application was adjourned several times until, on the 18th June, 1910, it was struck out without any order being made thereon.

The report of the Taxing Master was as follows:—

"The following are the grounds and reasons of my decision on the objection of the dischargeants, Lord Francis Hervey, Francis Rawdon Moira Crozier, and Thomas Francis Crozier, and of The Honourable Richard Frederick John Donough Trench, commonly called Lord Kilconnel, The Hon. Roderic Charles Berkley Trench, The Hon. Greville Sydney Rochford Trench, and The Hon. Lady Beryl Franziski Kathleen Bianca Trench, infants, by the said Lord Francis Hervey their guardian *ad litem*, to the disallowance of item 185, in their costs in this matter

Appeal. 1910. *In re* CLANCARTY.

taxed by me in pursuance of the order of the Court of Appeal in Ireland, dated the 7th of February, 1910.

"2. I refer to the said objection dated the 7th of July, 1910.

"3. The terms of the said order as to costs are as follows":—

[The Master here set out the order as given *ante*, pp. 200, 201.]

"4. The said item 185 (1) is claimed for instructions for brief on the hearing of the said charge and discharge in the Court below. This hearing took place at a sitting of the Court presumably fixed in accordance with item 97 of the Bankruptcy Schedule of Fees.

"Proceedings by charge and discharge are regulated by Order LXXXVIII., Rules 57–64.

"I refer to items 74 and 75 of the High Court Schedule of Fees as to instructions for charges and discharges. The maximum fee for the discharge herein has been allowed on the higher scale as claimed in the costs.

"Item 73 of the High Court Schedule of Fees prescribes an allowance for instructions for brief 'on hearing of trial of action upon notice of trial or notice for judgment given, &c.'

"At item 232 of the chargeants' costs a similar claim for instructions for brief is made, and on the 9th of November, 1909, Mr. Alexander F. Blood, K.C., appeared before me on behalf of the chargeants in support of it. Counsel on behalf of the present dischargeants appeared *contra*, and convinced me, then, that the claim was unsustainable, and I disallowed it. At item 516 of the present costs I have passed his fee of £3 3*s*. on the argument of the question of principle before me.

"On the 14th inst. Mr. William M. Crozier, counsel, appeared before me in support of the said objection, also Mr. M. G. Longfield, counsel for the dischargeant, the said Right Hon. Adeliza, Countess Dowager of Clancarty, in support of a similar objection dated 8th instant. The consideration of both objections was then adjourned to the 18th inst. on the application of the chargeants' solicitor, in order that he might

(1) 350 guineas.

consult counsel. On the 18th inst. the question was debated by the said learned counsel and by the representative of the chargeants' solicitor before me.

"It will be observed that all the memoranda on the files of the proceedings herein relating to the hearing of the said charge and discharges, and to the adjournments, bear record that same took place at a 'sitting,' or 'adjourned sittings,' of the Court.

"It will also be observed that the said order of the Court of Appeal follows the terms of the order of the Court below of the 14th of May, 1909, as to the allowance of costs on the higher scale.

"There is no prescribed fee in the Bankruptcy Schedule for instructions for brief on the hearing of a charge and discharge, nor, so far as I am aware, in the Higher Court Schedules for a proceeding on charge and discharge, either higher or lower scale.

"Items 524 to 528 of the present costs are conversant with an application dated the 3rd December, 1909, to Mr. Justice Boyd, on the part of the chargeants, that the costs of the hearing of the charge and discharge herein be taxed as costs of the hearing of an action, and that the Taxing Master be directed to tax the said costs on that basis. At item 527 of the present costs the application is described as one to amend the said order of the 14th of May, 1909.

"The orders and the minutes on the file of proceedings No. 2 herein, respecting the said application, bear the following dates:— the 10th December, 1909, the 13th May, 1910 (Order and Minutes), the 10th of June, 1910, and the 18th of June, 1910. I beg leave to refer thereto.

"The attendance of Mr. Jellett, K.C., and of Mr. Crozier, solicitor, are recorded on the order of the 13th May, 1910, when they applied that the said notice of motion of the 3rd December, 1909, be re-entered for hearing.

"It appears from the file of proceedings that on the 18th of June, 1910, the motion was struck out of the list.

"I have now given the subject of the objection all the consideration in my power, and I overrule the objection, inasmuch

Appeal. 1910.

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as I am of opinion that the item in question is not allowable under the circumstances of the case.

"JEHU MATHEWS,

"Taxing Master.

"The 25th of July, 1910.

"I desire to add that the examination of witnesses on commission or otherwise, the discovery of documents, and the administering of interrogatories referred to in the said objection are applicable to the hearing of charges and discharges in bankruptcy. I refer to Order LXXXVIII., Rule 70, thereon.

"JEHU MATHEWS."

Serjeant O'Brien, K.C., and *W. M. Crozier*, for the dischargeants in support of the application :—

The definition of "action" in section 3 of the Judicature Act (Ireland), 1877, is wide enough to include the present proceedings. "Action" is defined to mean a civil proceeding which may either be commenced by writ or in such other manner as may be prescribed by rules of Court, excluding, of course, criminal proceedings. Assuming that rules of Court are to be restricted to rules of the Supreme Court, though not so defined, there might have been grounds prior to the bankruptcy jurisdiction being transferred to the King's Bench Division for holding that proceedings by way of charge and discharge, then regulated by the bankruptcy rules, would not come within the term "action" as here defined. But, by the rules of the Supreme Court of 1905, the procedure in the King's Bench Division (Bankruptcy) was regulated, and proceedings in cases of this nature by charge and discharge are prescribed : Order LXXXVIII., Rule 57, and following Rules. All the proceedings in this case were carried on as an action. There was full jurisdiction to give discovery, to summon witnesses, and to grant relief. An action in the Chancery Division would have presented a merely formal difference in procedure, and no one thought of suggesting that course. Boyd, J., was exercising the jurisdiction of a Judge of the High Court ; *In re Domvile* (1). The allowance of these costs is within the discretion of the Court : Order LXV., Rule 1.

(1) 1 L. R. Ir. 198; 3 L. R. Ir. 282.

Blood, K.C., for the assignees :—

It is impossible to hold that this was an action. The dischargeants in their objection to our costs adopted the view that it was not an action, and that the costs should be taxed on the basis that it was a bankruptcy proceeding. This application, if tenable at all, should have been made to Judge Boyd. Order LXV., Rule 1, only applies to the allowance or disallowance of the costs of a proceeding generally. It has no application to the particular items in the bill of costs of a successful party who has been awarded costs.

Serjeant O'Brien, K.C., in reply :—

This was a proceeding prescribed by the rules of Court, and therefore it is an action. Under Appendix S, Part I, 75, the Court has full power to allow a proper sum for instructions for brief. The Court has judicial knowledge of the important questions raised in the case, its protracted length and the value of the property in dispute.

THE LORD CHANCELLOR :—

The only question is, whether these proceedings came within the definition of "action" in the 3rd section of the Irish Judicature Act. It is said that important rights and large property were involved. But all parties acquiesced in treating the case as an ordinary one of charge and discharge, and it was dealt with throughout on that basis. We think it impossible to hold that proceedings by charge and discharge come within the definition of action, and therefore we are of opinion that the decision of the Taxing Master was right, and that the objections by the dischargeants to his taxation cannot be supported. The application must be refused.

HOLMES and CHERRY, L.JJ., concurred.

Solicitors for the dischargeants : *Thomas Crozier & Son.*
Solicitor for the assignees : *Richard Davoren.*

W. G.

K. B. Div. 1910.
Feb. 16, 17, 18, 24.

THE KING (AT THE PROSECUTION OF JOHN JACKSON) *v.* THE COUNTY COUNCIL OF THE COUNTY OF CORK (1).

Practice—Mandamus—Civil proceedings on Crown side—Variation between writ and order—Amendment—Order XXVIII., Rr. 6, 12; *Order LXXXIV., R.* 253.

Where the command in a writ of mandamus varies from that contained in the order allowing the issue of such writ, it is a matter of course to quash the writ so varying.

There is no jurisdiction to amend a writ of mandamus that varies as aforesaid, unless the order giving leave to issue it is similarly amended either prior to or contemporaneously with the amendment of the writ.

Where a mandamus commands several things, the prosecutor must show that he is entitled to enforce every one of such commands; and, if he fails to establish a right to enforce any one of such commands, a peremptory mandamus cannot go.

MOTION on behalf of the Crown for an order that judgment be entered for the prosecutor on the findings in the trial of the writ of mandamus herein, and that a peremptory writ of mandamus be awarded in that behalf.

The prosecutor, John Jackson, Inspector of Factories, on April 22nd, 1908, obtained a conditional order for mandamus "directed to the County Council of the county of Cork, commanding them, according to their duty and statutory authority as having the general management and control of the dock, wharf, and quay, at Courtmacsherry, to put in force the regulations contained in Part I of the Regulations dated the 24th day of October, 1904, made by the Secretary of State in pursuance of the Factory and Workshop Act, viz. :—

"(1.) To provide secure fencing for the breaks, dangerous corners, and other dangerous parts of edges of the dock, wharf,

(1) Before PALLES, C.B., GIBSON and BOYD, JJ.

or quay of Courtmacsherry, so that the height of the fence shall be in no place less than 2 feet 6 inches, and the fencing shall be maintained in good condition ready for use.

"(2.) To provide, for the rescue from drowning of persons employed, a reasonably adequate supply of life-saving appliances, to be kept in readiness on the wharf or quay at Courtmacsherry; and to provide means, at or near the surface of the water, for enabling a person immersed to support himself or escape from the water.

"(3.) To provide efficient lighting for the dangerous parts of the regular road or way over the dock, wharf, or quay at Courtmacsherry, forming the approach from the nearest highway."

This conditional order was made absolute, and the writ issued, its mandatory part following the terms of the order giving leave to issue, as set out above. The County Council filed an answer to the writ, and the trial of the action came on before Lord O'Brien, L.C.J., and a special jury of the city of Dublin, on April 19, 23, 24, and 26, 1910.

At the trial, it transpired that there was no regulation under the Factory Act, 1901, requiring the dangerous parts of the regular road or way, over a dock, wharf, or quay, "forming the approach from the nearest highway," to be efficiently lighted, as was sought to be enforced in paragraph (3) of the absolute order. The regulation relied on by the prosecution was Regulation 3 of Part I of the Regulations, No. 1617, dated October 24th, 1904, made by the Secretary of State, in pursuance of the Factory and Workshop Act, 1901, and was in fact in the following terms:—

"All places in which persons employed are employed at night, and any dangerous parts of the regular road or way over a dock, wharf, or quay, forming the approach *to any such place* from the nearest highway, shall be efficiently lighted."

The defendants' counsel early in the trial objected to the admission of any evidence of necessity for lighting on the ground that there was no such duty cast on the defendants as was set forth in the terms of the writ; and, at the conclusion of the case

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for the prosecutor, they asked for a direction on the ground that where a writ of mandamus was bad in part it was bad *in toto.* Counsel for the prosecutor thereupon asked for leave to amend the writ by striking out the claim for lighting as it stood in the writ and substituting therefor a claim stated in the actual words contained in the regulations. The Lord Chief Justice granted the application, and ordered that the plaintiff be at liberty "at his own risk" to amend the writ of mandamus in the manner stated, whereupon counsel for the defendants moved his Lordship sitting as a Judge of the King's Bench Division for an order quashing the writ of mandamus as so amended, upon the ground that it varied from the terms of the order giving leave to issue. This application was refused. The defendants' counsel then further asked for leave to put in a new return to enable them to traverse any demand and refusal. The Lord Chief Justice declined to allow any traverse of demand and refusal, except such as might arise out of any new matter introduced by the amendment. No return was filed by the defendants to the writ as amended.

The questions submitted to the jury, and their answers thereto, were as follows:—

"(1.) Are there any breaks on the quay, wharf, or dock, at Courtmacsherry; if so, where? *Answer.*—No, except steps.

"(2.) Are there any dangerous corners on the said quay, wharf, or dock; if so, where? *Answer.*—No.

"(3.) Are there any dangerous parts of the edges of the said quay, wharf, or dock; if so, where? *Answer.*—No.

"(4.) Are there places on the Courtmacsherry quay, dock, or wharf, in which persons employed are employed in the dark; if so, where? *Answer.*—No.

"(5.) Are there places on the Courtmacsherry quay, dock, or wharf, in which persons employed are employed between 9 p.m. and 6 a.m.; if so, where? *Answer.*—No.

"(6.) Are there any dangerous parts of the regular road or way over the said dock, quay, or wharf, forming the approach to a place where people are employed at night from the nearest highway; if so, where? *Answer.*—No."

On these findings the Judge abstained from giving judgment for either party, and left the parties respectively to move the King's Bench Division for such judgment as they might be respectively advised.

The Attorney-General (*Right Hon. Redmond Barry, K.C.*), *The Solicitor-General* (*Charles A. O'Connor, K.C.*), *Dudley White, K.C.*, and *John Linehan*, for the prosecutor, moved for judgment and for a peremptory writ directed to the Cork County Council requiring them to provide secure fencing for the "break," *i.e.* the steps, as per the first finding of the jury; and also to provide, for the rescue from drowning of persons employed, a reasonably adequate supply of life-saving appliances, to be kept in readiness on the wharf or quay at Courtmacsherry, and to provide means at or near the surface of the water for enabling a person to support himself or escape from the water. They contended that the amendment at the trial did not prejudice the defendants, and the Judge had power to make such amendment: Order LXXXIV., Rule 253, and Order XXVIII., Rules 6, 12; that an action for mandamus was brought within the first-named rule. They also referred to *The Queen* v. *Tithe Commissioners for England and Wales* (1); *Local Government Board for Ireland* v. *The King* (2); *The Queen* v. *Ellis* (3); Common Law Procedure Acts, 1853, section 231; 1856, section 79.

Ronan, K.C., H. D. Conner, K.C., and *T. Sullivan*, for the Cork County Council:—

The Rules clearly provide that the existing practice is not to be altered unless where expressly changed. A writ of mandamus bad in part is bad *in toto*: Short and Mellor (1908 ed.), p. 232; Tapping on Mandamus, p. 284. It is plain that an information is not a pleading within the meaning of the Rules; it is not a statement of claim: see Order LXXXIV., Rules 102, 104; power to amend does not extend to the writ or return:

(1) 14 Q. B. 459. (2) [1903] A. C. 402.
(3) 2 Dowl. (N. S.), 374.

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see *R.* v. *Licensing Justices of Pirehill North, Staffordshire* (1), as to how far the new rules affect the old practice. Rules 185 to 190 deal with writs as quite apart and distinct from pleadings. There should be judgment for the defendants, because—(1) the writ in its original form before amendment was bad; (2) there was no power to amend the writ at all; (3) even if there were power to amend, there is no power to alter it so as to make it exceed what was authorized by the order; (4) there cannot be a peremptory mandamus except in the complete form; (5) there was no demand upon or refusal by the defendants. [Counsel cited the following authorities: *The Queen* v. *Mayor, Aldermen, and Councillors of Poole* (2); *The King* v. *Church Trustees of St. Pancras* (3); *The King* v. *Mayor, &c., of Stafford* (4); *The Queen* v. *Conyers* (5); *The Queen* v. *Derbyshire, Staffordshire, and Worcestershire Junction Railway* (6); *R.* v. *Lords and Stewards of Manor of Water Eaton* (7); *The Queen* v. *East Lancashire Railway Co.* (8); *The Queen* v. *Saddlers' Company* (9); *The Queen* v. *London & South-Western Railway Co.* (10); *The Queen* v. *South-Eastern Railway* (11); *The Queen* v. *Aldermen and Lord Mayor of London* (12); *The King* (*Hewson*) v. *Wicklow County Council* (13); *The Queen* v. *Aldermen, &c., of Newbury* (14); *The Queen* (*L. G. B.*) v. *Cheshunt Local Board* (15).]

Dudley White, K.C., in reply.

Cur. adv. vult.

Feb 24.

PALLES, C.B. :—

Until the discussion of this motion I was honestly under the impression that at this stage of our legal history, upwards of thirty years after the passing of our Judicature Act, we had arrived at a stage when nothing of form could prevail against

(1) 14 Q. B. D. 13.
(2) 1 Q. B. 616.
(3) 6 A. & E. 314.
(4) 4 T. R. 689.
(5) 8 Q. B. 981.
(6) 2 C. L. R. 1653.
(7) 2 Smith, 54.
(8) 9 Q. B. 980.
(9) 10 H. L. C. 404.
(10) 1 Q. B. 558.
(11) 4 H. L. C. 471.
(12) 13 Q. B. 1.
(13) [1908] 2 I. R. 101.
(14) 1 Q. B. 751.
(15) [1884] W. N. 78.

legal merits. I now see that I was mistaken; but I am glad to find that this result has not been caused by any error or omission of the Irish Judges in the preparation of their rules, but by the clause in our Judicature Act which imposes upon us the duty of following, as far as the circumstances of the country will admit, the rules made in England under the English Judicature Acts.

I am of opinion that we are bound to direct that the judgment shall be for the defendants.

In giving my reasons for this conclusion, I shall take separately two different matters: First, the question of amendment; and secondly, the position in which the case would have stood without amendment, and that in which it now stands having regard to the amendment made.

I have always given, and I will continue to give, unless I am prevented by some superior tribunal, the fullest benefit of the rules in relation to amendments in every stage of every proceeding. I believe that every Irish Judge has, since the Judicature Act, taken the most liberal view of the powers of amendment conferred by that Act. The rules as to amendment in civil proceedings are contained in Order XXVIII. By them three different matters are specifically pointed out, viz.:—(1) The endorsement upon the writ of summons; (2) pleadings and orders; and then (3) there is a general provision in Rule 12, in reference to proceedings, to which I shall later on call attention. There are several cases, all of which are referred to in the "Annual Practice," in which the writ, as distinct from the endorsement upon it, has been amended. That must be under Rule 12, which relates to "proceedings." Under the same rule it has been held that an originating notice of motion, which in its nature nearly approaches a writ of summons, can be amended. Having regard to these cases, I am of opinion that in a civil action the writ can be amended. Now, this Order XXVIII. is by Order LXXXIV., Rule 253, made applicable to all civil proceedings upon the Crown side, so far as it is capable of being applied. If, however, you have a proceeding upon the Crown side which, according to the practice of the Court, cannot vary from another proceeding, and if that other proceeding is amendable only under a certain condition, it seems, plainly, that this

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first proceeding cannot be one to which that rule as to amendment is applicable, otherwise than subject to the same condition. Now, that is the case here. The authorities are uniform that the command in a writ of mandamus cannot vary from that mentioned in the order allowing the issue of the writ, and that it is a matter of course to quash any writ that varies in this respect from the order. It therefore follows that you cannot amend the command in a writ of mandamus without amending the order giving liberty to issue the writ. I see nothing, however, that prevents an amendment of a writ of mandamus, provided that, either prior to, or contemporaneously with, the amendment, the order to issue it is also amended.

The learned Lord Chief Justice did not direct this order to be amended; and, that being so, I am of opinion that there was no jurisdiction to amend the writ without amending the order. I desire, however, to say that I am not to be taken as saying that the Lord Chief Justice might not have amended both the order and the writ. I do not *decide* that he had the power, as that question does not arise here; but I may express my opinion that he would have had the power to do so under Rule 11 of Order XXVIII., the "Slip Order." I am strongly of opinion that, where there is an error which prevents the order, as taken down and issued, from being the order which was pronounced by the Court, such error is amendable, either under Rule 11, or under the general jurisdiction of the Court. It is not necessary to refer to cases on that subject; all of them are collected in *Hatton* v. *Harris* (1), in which, after the lapse of nearly forty years, the House of Lords were about to allow an appeal to stand over to allow an application to be made to have the decree in question there amended under that "Slip Order," when the parties themselves, instead of allowing the case to stand over, agreed to the amendment being made, in consequence of which the order appealed from was affirmed. In that case a decree made in 1853 declared that the principal sum secured by a bond with a certain sum for interest, and further interest until paid, was well charged upon the debtor's lands. The decree did not limit the amount of the charge for principal and interest to the penalty of the bond.

(1) [1892] A. C. 547.

Part of the lands were sold in 1856; and the purchase-money was not sufficient to reach this charge, but in 1890 further sums were discovered which were applicable to the charge and were brought into Court to the credit of the cause. The question then arose whether the creditor was entitled to recover interest beyond the penalty. It was held that, by reason of the omission from the decree of the usual words limiting the amount recoverable to the penalty, he would be so entitled, unless the decree were amended; but it was the opinion of the Court that a decree without such a limitation could not have been intentionally made; and in the year 1892 the parties agreeing that the hearing before the House of Lords should be treated as an application to amend the decree of 1853, the order was treated by the House of Lords as being capable of amendment, and the amount payable to the creditor was cut down to that which would have been recoverable had the decree been amended by the insertion thereon of the words "not exceeding the penalty."

Now, as I was one of the Judges who made not only the conditional order, but the absolute order giving leave to issue the mandamus in the present case, I have thought it right to look into the original documents (which are in Court) upon which it was made; and I find that the order, as taken down, was not the order the Court intended to make. The only matter argued before the Court was, whether the County Council was bound to put in force the provisions of the Board of Trade which had been the subject of argument. The form of the conditional order was not stated to the Court. We acted upon the general practice of the Court (which up to the present has been, but which, as far as I am concerned, will not continue to be so in future) of allowing counsel to prepare the minute of the order in such form as he prefers. In this case, unfortunately, the learned counsel inserted in the conditional order a few words which had better have been omitted. Cause was shown against the conditional order and an absolute order was applied for. No objection was raised with reference to the form of the conditional order. The point now relied on was not discussed. I have a shorthand note of the judgment given; and I find that the only question determined or glanced at, and, according to my recollection, the only question

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argued, was whether the Cork County Council was the body to give effect to this order of the Board of Trade.

The wording of Rule 11 is, that the Court or Judge shall be at liberty to make the amendment. I do not suppose that any Judge, except one of those who sat when the order was made, or to whose knowledge the circumstances I have mentioned were brought, would have made the amendment; but I think that if the facts I have now stated had been before the Lord Chief Justice, he would have made the order. That concludes the case as far as the amendment is concerned, and we must treat the writ as if it were unamended.

I now proceed to the other question. It seems to me that, whether the amendment was made or not, having regard to the facts of the case, our judgment must be for the defendants. That opinion is grounded, not only upon the settled practice of the Court as to writs of mandamus as far back as we have been able to ascertain it, but also upon Rule 41 of Order LXXXIV.: "Where, under Rules 40 and 104, the applicant obtains judgment, he shall be entitled forthwith to a peremptory writ of mandamus to enforce *the command contained in the original writ*, and the judgment shall direct that a peremptory writ do issue."

That is, that the peremptory writ to which the prosecutor is entitled is one to enforce the demand contained in the original writ. It is plain, therefore, that without an amendment the prosecutor on the findings here cannot succeed, because on those findings he is not entitled to enforce the demand in the original writ. Mr. Conner was good enough last evening to refer me to Lord Halsbury's "Laws of England," vol. x., p. 122, where the law upon this subject is neatly summarized; he says:—

"A peremptory writ always issues in the same terms as the original writ, except that it includes the word 'peremptorily,' and omits the alternative of showing cause against compliance. The original writ is enforceable in the terms in which it was issued, *or not at all.* Nor will the form of the writ be altered to suit what upon the return may be considered the justice of the case. If there is a mandamus commanding several things, the prosecutor must show that he is entitled to the whole. If the claim for one of them fails, a peremptory mandamus cannot go."

I need not refer to the other authorities cited during the argument, except one, upon which and the Rule I have mentioned, I base my judgment. It is a passage from a judgment of Lord Halsbury, in *The Local Government Board for Ireland* v. *The King* (1), in which he says:

"I am much surprised that the learned Judge (Holmes, L.J.) concludes his very lucid judgment by a suggestion that the form of the writ is one which can be altered to suit what, upon the return, may be considered the justice of the case. My Lords, I cannot at all assent to any such view. The writ of mandamus cannot be so used. The thing sought to be enforced by that writ must be distinctly pointed out; and if the return is insufficient, the course of procedure is, and must be, the issue of a peremptory mandamus, *which must follow the terms of the original writ*; and if the learned Judge to whom I refer is right, as I think he is, it would be absolutely impossible to alter the form of the writ. It is not a question of technicality or mere form. The duty sought to be enforced must be as a matter of substance and not form definitely ascertained, and its performance definitely demanded and refused."

I now shortly apply this statement of principle to the case before us. Supposing there is no amendment, one of the three duties mentioned in the writ is one which the prosecutor is not entitled to have enforced; and therefore, a peremptory mandamus cannot go at all, and there must be judgment for the defendants. On the other hand, supposing the writ were originally in proper form or had been amended, one of the duties sought to be enforced by the writ so framed either does not arise under the particular state of facts existing, or it has been performed. I do not know in which way the finding of the jury is to be read; but undoubtedly, notwithstanding the amendment, a duty, the performance of which was commanded by the writ, would remain, the performance of which the prosecutor is not able to enforce against the defendants: consequently, even in that case judgment should be for the defendants.

We have considered the question of costs. It must be

(1) [1903] A. C. 405.

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remembered that here the verdict was for the defendants, and although, for myself, I should have preferred that the objection made had been taken at an earlier stage, as I believe it could have been, I think that, in point of law, there is nothing that would justify us in deviating from the ordinary course. The judgment must therefore be with costs.

GIBSON and BOYD, JJ., concurred.

Solicitor for the prosecutor: *Malachy Kelly.*
Solicitor for the defendants: *A. H. Exham.*

J. M.

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Feb. 15, 20.

MARY MAGUIRE AND PATRICK MAGUIRE, APPELLANTS; FERGUS QUINN, RESPONDENT (1).

Gaming—Betting Act, 1853 (16 & 17 *Vict. c.* 119)—"*Owner or occupier using any house for the purpose of betting with persons resorting thereto*"—*Betting establishment—Evidence of user—*"*Assisting in conducting the business of any house so used.*"

M. M., with the assistance of her brother P., kept a shop, nominally for the sale of chandlery, tobacco, and stationery. The police observed that on days when the newspapers announced that horse races would take place, numbers of persons visited the shop, including a man known to the police to be a bookmaker's "tout" who, on such days, was observed to visit the shop several times in the day. On making a raid the police found M. M. behind the counter, and three men in the shop, one of whom was writing out a betting docket on the counter. Two other betting dockets were found on the floor beside another of the men, and M. M. was observed to crush up and throw behind the counter two slips of paper which were found to be betting dockets, one being signed "Tom." Betting newspapers were found on the counter, and betting literature behind the counter and in the back parlour. M. M. was charged with using the shop for the purpose of betting with persons resorting thereto, and P. with "assisting in the conduct and management of the shop." The only evidence against P. was a statement that he "assisted M. M. in the shop," made by the prosecutor in giving evidence before the magistrate. Both M. M. and P. were convicted and fined.

Held, that the shop presented all the *indicia* of a "betting establishment," and that, on the evidence, the magistrate was justified in convicting in both cases.

(1) Before LORD O'BRIEN, L.C.J., and BOYD, J.

CASE STATED.

The facts of the case, and the evidence before the magistrate, appear sufficiently in the judgments.

Joseph O'Connor, for the appellants :—

There is no evidence that Mary Maguire used the shop for the purpose of herself betting with persons resorting thereto. There must be evidence from which a reasonable inference can be drawn; no such inference can be drawn here. These cases under the Betting Act are cases of mixed law and fact; there is not the standard of affirmative evidence which is necessary in this case.

[Counsel referred to the Betting Act, 1853 (16 & 17 Vict. c. 119, sect. 3); *M'Connell* v. *Brennan* (1); and the judgment of Palles, C.B., in the *Stephen's Green Case* (2).]

H. Macdermott, for the respondent :—

The Crown need only show that there was some evidence to justify the conviction. If this were a jury case, it could not be contended that there was no evidence to go to the jury. The documents found are the equipment of a betting establishment.

Cur. adv. vult.

Feb. 20.

LORD O'BRIEN, L.C.J. :—

It is admitted that the charges contained in the summonses are right, and that they are in accordance with the statute under which they were brought. The complaint made against the defendant, Mary Maguire, is of the same nature as the charge made in the case of *M'Connell* v. *Brennan* (1). It is not a charge of "keeping" or "opening" a house for the purposes of betting, but a charge of "using a house for the purpose of betting with persons resorting thereto." It was not denied before us, nor, indeed, having regard to the evidence, could it be denied that the defendant, Mary Maguire, was the occupant of the house in question. There was only one question in her case, namely, Was there evidence to sustain the charge preferred against her that,

(1) [1908] 2 I. R. 411. (2) Unreported.

K. B. Div. 1911.

MAGUIRES, *Appellants;* QUINN, *Respondent.*

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being the occupier of the house, she used it for the purpose of betting with those persons who resorted thereto?

The facts of the case appear from the case stated by the magistrate who convicted—Mr. Swifte—and are thus succinctly set out in paragraphs 4 and 5 of the case:—"At the hearing of the said complaint it was proved on the part of the said complainant that at 12.40 p.m. on the said 18th day of September, 1909, he, with two constables, entered the shop 6 Benburb Street, on the authority of a warrant, and found therein three men outside the counter, one of whom (M'Nicholls) was writing on a slip of paper which contained the following: '2*s.* Stamina, win; 2*s.* credit Marchesa, win—W. M'Nicholls.'" Another of them named M'Guinness was standing at the lower end of the counter, and beside him were found two pieces of paper, one of which contained the following:—1*s.* Succour, 1*s.* 1, 2, 3; 1*s.* Christmas Daisy; 1*s.* Fallen Angel, 1*s.* 1, 2, 3; 1*s.* Succour, credit 1*s.* Cocksure; 1*s.* Schnapps, 1*s.*, 1, 2, 3, credit 1*s.* Retrenchment." The paper was signed "Rice." The other piece contained the following: "1*s.* Submit win credit, the Tower 1*s.* each way; 1*s.* the Tower win, credit 2*s.* Submit; 2*s.* Retrenchment win, credit 2*s.* Simonson win." These were not mere slips of papers, mere unsuggestive blanks, they were betting dockets, and any man of ordinary intelligence could perceive their character at once. The case continues—"One of the defendants, **Mary Maguire, was** behind the counter, and threw from her hand two slips of paper which were as follows: "1*s.* White Eagle win, R. Q." and "2*s.* Succour win, 1*s.* ditto 1, 2, 3—Tom"—evidently betting dockets. A copy of the *Racing Specialist* of the 14th September, 1909, was found behind the counter, and racing circulars belonging to Webster of Holland were found in the back parlour. A copy of the *Racing World* was found on the counter. It was admitted that an actual business in sporting and other papers, tobacco, and chandlery was carried on in the shop aforesaid. Evidence was given by the complainant that the names on the slips or pieces of paper were those of horses announced in the public press as intended to be run at certain races which were announced in like manner as coming off or intended to be held on the afternoon of the said day (18th September, 1909), and further evidence to the same effect was

given by the production of a *Saturday Herald* of that date; but to this latter newspaper counsel for the defendants objected, on the ground that an announcement in the said *Herald* was not evidence that any such races were in fact held or came off; this, however, was on the second day of hearing, when the newspaper was produced by the complainant on his cross-examination by defendants' counsel. I only admitted the said newspaper as evidence of the said announcement therein as that of an intended event. There was evidence that at different hours of the day, varying from 11 o'clock a.m. until 3 p.m."—the crucial part of the day as regards betting—"on several days when horse races were announced to be run within the previous three weeks, a considerable number of men and women, ranging from twenty-four to over forty, entered the shop, one of whom was known to the police to be an agent or messenger for betting men, and who called at the shop frequently, and often several times on the same day"—he did not call at the shop to buy chandlery, or even tobacco, several times on the same day. "There was very little evidence of any sales of goods or newspapers in the shop. The sum of 27*s.* was found rolled up in a piece of paper in one of the drawers behind the counter other than the ordinary money-drawer. It was also proved that the defendant, Patrick Maguire, assists in the business carried on in the shop." The latter statement is the only evidence against Patrick Maguire in the case, but the other part of the case is perfectly plain. Anyone reading the case would know at once this was a betting establishment, at the head of which was Mary Maguire.

There are four depositions appended to the case. I wish to refer only to portion of the deposition of Constable 113 D. He says, "I had defendants' place under observation for about three weeks before the 18th September. On the 27th August between 12 and 1 p.m. twenty-five men and seven women entered the shop. I knew one of the men a number of years; he carries bets, and associates with betting men"—betting men have not a peculiar interest in the chandlery or tobacco business—"He entered five times during the hour"—a good many times for the purchase of chandlery, or even tobacco. "On the 20th August, between 11 and 12.30, twenty-one men and

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thirteen women entered, and the man I have referred to entered four times." On cross-examination, the constable said, "I found three betting dockets"—observe, he calls them betting dockets, not slips of paper—"behind the counter. I saw Miss Maguire throw them out of her hand. She had them in her hand when I saw her. Two dockets were found beside another man."

That is the evidence in the case: what does it show? It shows that this shop presented all the signs, all the *indicia* of a betting establishment; that it *was* a betting establishment. Several betting dockets were found. It is well to dwell upon that. They were betting dockets; anyone looking at these pieces of paper and seeing on them the amounts of money and the names of horses to run in the day's races, could see at once they were betting dockets. One of the defendants, Mary Maguire, was standing behind the counter, the place from which business of a shop is generally conducted. One of the men, McNicholls, was actually drawing up a betting docket on the same counter. Mary Maguire crushed up in her hand, and threw behind the counter, betting dockets when the police appeared on the scene. Very many people resorted to the house apparently for no legitimate business, and one man, who carried bets, and who is an associate of betting men, was known to come to the shop several times at different hours on several days; he was certainly not interested in the chandlery or tobacco business. Not alone is it proved by the evidence that the house was a betting establishment, but, also, that betting was actually being carried on there on the 18th September, 1909, by the occupier, Mary Maguire, who certainly seemed conscious of the illegal nature of the transaction on which she was engaged.

The only difficulty I had in the case was with reference to the brother, Patrick Maguire. I referred to him more than once in the course of the argument. He was convicted as well as Mary Maguire, and the only evidence against him was the statement of Inspector Quinn that "he assists Mary Maguire in the shop." I take it that this meant that he assisted his sister in the entire business carried on in the shop. No doubt there was a chandlery and tobacco business as well as the business of betting carried on; it would have been too crude, too flagrant a violation of the law

to carry on solely and exclusively the business of a betting establishment. The business seems to have been of a mixed character, but there was no limitation as to the assistance which the brother gave to the sister in the shop, and I think, accordingly, there was evidence against him which justified the magistrates in convicting him.

The suggestion made by Mr. O'Connor that Mary Maguire did not carry on the business of betting, and that the shop she occupied was not a betting establishment, but that her whole action was consistent with the notion that she merely indulged in the pastime of backing horses, seems to me to be far-fetched and wholly without foundation.

We think the magistrate was right in his determination, and shall so answer the case stated.

BOYD, J.:—

The Betting Act, 1853 (16 & 17 Vict. c. 119), enacts, in section 1, that no house shall be used for the purpose of betting with persons resorting thereto, or for the purpose of any agreement or promise, express or implied, to pay or give thereafter any money on any event or contingency of or relating to any horse race, &c., or securing the paying or giving by some other person of any money on any such event or contingency: and further that any house used for the purpose aforesaid "is hereby declared to be a common nuisance and contrary to law." By section 3 it is enacted that any person who shall use any house or room for the purposes aforesaid, and any person in any manner assisting in conducting the business of any house used for the purposes mentioned, shall on summary conviction be liable to pay a penalty therefor not exceeding £100, or may be committed to gaol for a period not exceeding six months with or without hard labour.

The question for our decision in the present case is, whether there was sufficient evidence before the able, efficient, and experienced magistrate who heard this case to warrant him in coming to the conclusion that the shop at No. 6, Benburb Street was used for the purposes forbidden by the said statute.

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Boyd, J.

It is to be observed that the statute not only forbids bets being made by the person who so uses the premises, but also bets made through that person with any other person. It is therefore immaterial whether the defendant, Mary Maguire, was the person who should herself be responsible for the payment of the bet, or whether she was merely the agent for some other person for whom she was acting. If the premises were used by her for the illegal purposes, she is liable, and any person *in any manner assisting in conducting the business of the house used for such purposes* is likewise liable.

There is no dispute as to the fact that Patrick Maguire did assist his sister in conducting the business for which the house, 6, Benburb Street, was used.

What is the evidence in this case as to the user of the said house? No doubt the shop was ostensibly a shop for the sale of chandlery, tobacco, and newspapers, but the question is, was it also used for purposes forbidden by the Betting Act. For about three weeks the place was under the observation of the police. On September 3rd, 1909, between the hours of 11.30 a.m. and 12.30 p.m., twenty-three men entered the shop and only remained on the average about a minute—and one of these men, who was known to be associated with betting men, entered and left the shop three times during that period. On 4th September, 1909, between the hours 12.30 to 2 o'clock p.m. thirty men entered and only remained for a short time, and among them the betting man entered it four times. On 15th September, between 12.30 and 1.30 p.m., twenty-four men entered, and the betting man entered five times. On 17th September, thirty men and thirteen women entered, and the betting man entered six times, between 11 a.m. and 2 p.m. These days were days on which racing was announced as being held in England. On 18th September, the police entered the shop, and there found four men, and Miss Maguire was behind the counter; she had in her hand three betting dockets which, when she saw the police, she crushed up and threw into a bucket behind the counter; two other betting dockets were found beside one of the men in the shop. The police also found a newspaper called the *Racing Specialist* behind the counter, and racing circulars belonging to Webster of Holland were found in the back parlour,

and a pocket diary of Miss Maguire in a drawer of the counter in which were entries of horses with money against them. One of the men in the shop was standing at the counter in the shop writing a racing docket. All these dockets contained the names of horses entered as running in the races then proceeding.

In my opinion, the magistrate had abundant evidence before him to justify his conviction of the defendants.

We have been referred to the case of *Mc Connell* v. *Brennan* (1), but, in my opinion, it has no bearing on the facts proved in the present case. In that case there was evidence of only one isolated transaction of betting, whereas in this case the documents found on the premises, the action of the defendant as to the betting dockets which she had in her hand, the frequent visits each day of the man associated with betting men (2), and the number of men resorting to the premises for no ostensible business on days when races were being held, the character of the papers exposed for sale in the shop, and what I may describe as the entire atmosphere of the place, indicate that the premises were used for betting purposes.

I am of opinion our answer to the question submitted to us should be in the affirmative.

Solicitor for the appellant: *J. G. Lidwell.*

Solicitor for the respondent: *Malachy Kelly.*

C. N. K.

(1) [1908] 2 I. R. 411.

(2) See *R.* v. *Wyton*, [1910] 5 Criminal Appeal Reports, p. 287, with reference to the liability of a "runner" or "tout" to punishment under the Act.—REP.

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PICKERING *v.* CORPORATION OF BELFAST (1).

Tramway—Injury to passenger—Overcrowding—Service for special attraction—Descent by front platform—Precautions to be taken by owners of tramcar—Evidence of negligence.

On the occasion of an International football match to be played in a well-known ground in the suburbs of Belfast the plaintiff boarded a tramcar of the defendants labelled "Linfield" (the football ground) "or Windsor Avenue." When plaintiff took his seat in the front of the roof, there was no lack of accommodation, but as the car proceeded on its way passengers continually collected until every space was filled and the car became overcrowded. On reaching a stopping-place within a short distance of Windsor Avenue some passengers alighted, descending by the front steps to the motor-man's platform, the collapsible gate by which it was guarded being then opened, and the step to the road being let down. As the car was approaching Windsor Avenue, which is the usual stopping-place for the Linfield grounds, plaintiff rose from his seat, descended by the front steps and told the motor-man he wanted to get off. The gate was open, step let down, and the car slowed as if to stop. Just then an Inspector of the defendants called on the motor-man to go on, which he did, and the pressure of the descending crowd behind plaintiff threw him off the car and he was severely hurt. At the trial the defendants, at the close of the plaintiff's case, asked for a direction and did not offer any evidence or suggest any questions to be left to the jury. In answer to the questions left to them the jury found that the defendants should have expected that at Windsor Avenue, having regard to the overcrowding, passengers would leave the car hurriedly by the front platform: that they did not take proper precautions to prevent injury to any passenger so proceeding; and that it was by reason solely of failure to take such precautions that the injuries to plaintiff occurred, it having been explained to the jury by the Judge that they should not find the last point in favour of the plaintiff if there was contributory negligence on his part.

Held, that the circumstances justified the verdict, and that the plaintiff was entitled to judgment thereon.

MOTION on behalf of the defendants for an order to set aside the verdict for £250, which had been found for the plaintiff and to

(1) In the King's Bench Division before MADDEN, KENNY, and WRIGHT, JJ.

enter a verdict and judgment for the defendants, on the ground that there was no evidence proper to be left to the jury in support of the plaintiff's case, that the Judge should have directed a verdict for the defendants; and motion by the plaintiff to enter judgment for him on the findings of the jury.

The action was brought to recover damages for personal injuries sustained by the plaintiff while a passenger on a tramcar of the defendants, through the alleged negligence of the servants of the defendants in the management of the car.

The defendants by their statement of defence (1) traversed the alleged or any negligence; (2) denied that it was in consequence of any act or neglect on their part that the plaintiff suffered injury; (3) alleged contributory negligence by the plaintiff.

The plaintiff joined issue.

The action was tried at the Belfast Summer Assizes, 1910, before Dodd, J., and a special jury.

The plaintiff deposed that on the 19th March, 1910, at 2.20 p.m., he got on a tramcar to Linfield, where the International Football Match was to be played. He boarded the car with a companion, Hugh J. M'Conville, and went to the top where there was then plenty of room, and they seated themselves on the second seat, right-hand side. Two other passengers, Peter Brown and Alexander Gordon (subsequently examined), were on first seat to left. As the car proceeded a constant stream of passengers arrived, "sitting on each other's knees, standing up on aisles, corners filled. Edinburgh Street is reached before Windsor Avenue (close to Linfield). On the journey the front platform was protected; barrier (*i.e.*, collapsible gate) was up, and front steps up. At Edinburgh Street some people got down by front platform. The trams were congested and stopped at Edinburgh Street. At Lower Windsor Avenue there is a 'stop by request' pole." Up to then M'Conville and plaintiff were seated, and the tramcar was still crowded. Plaintiff proceeded: "Just as tram was half over Avenue, I got up. We moved up to the front steps, and went down the front and told the motor-man we wanted to get off. The collapsible gate was open, and steps down. He slackened the speed. We went down to platform; we got to bottom of

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steps. I asked him to stop. Inspector told him to go on as high as he could. We were on the platform. The people were all coming down. I believe he would have stopped. Difference in speed was perceptible. He had worked the brakes to stop the car. When he put on again, all the people said 'Stop.' The people were excited behind us, and just bustled us off the car. I was thrown into the middle of track; fell on it; fell on elbow." [The serious nature of the injury was not disputed, nor was the amount of the verdict challenged if the defendants were liable.]

The plaintiff's evidence was corroborated by Mr. M'Conville. He said that he himself was "crushed out."

Peter Brown said that he got off at Edinburgh Street by the front. The collapsible rail was open and steps down. He then gave the following answer, subject to objection: "I have seen," when tramcars were crowded, "both platforms used as means of exit. I have seen the collapsible gates removed by the motor-man to permit passengers' exit. I have seen the motor-man lower the step immediately following the gate." Witness said that Windsor Avenue was the nearest approach to the place where the match was to be played. The inscription on the car was "Linfield or Windsor Avenue." The car was a special football car. The general rule in such cases is to stop at Windsor Avenue.

James M'Inerney, member of football club, said it was the recognized practice for passengers to descend at both ends of the car. The practice was to keep the collapsible gate shut at motor-man's platform till the tramcar arrived at the end of the journey, and then for the motor-man to shift the gate, let down the step, and allow the passengers out at that end.

There was further corroborative evidence as to the practice of cars for football matches stopping at Windsor Avenue and letting out passengers by the front platform; also as to overcrowding.

At the close of the plaintiff's case, counsel for the defendants asked for a direction on the grounds—

1. That there was no evidence of negligence on the part of the defendants or their servants.

2. That there was the admission by the plaintiff and other evidence, establishing contributory negligence on his part.

Chambers, K.C., for the plaintiffs, relied on :—

First, overcrowding, with failure to stop when required to do so at a recognized stopping-place.

Secondly, opening gates and lowering steps at or approaching Windsor Avenue, as an invitation to passengers to alight.

Thirdly, opening gate before the car stopped.

Fourthly, direction by Inspector (servant of defendants) to proceed when motor-man was going to stop.

His Lordship reported that he thought it better to take the opinion of the jury, and he proposed to ask them, if they thought the injuries were caused by the negligence of the defendants' servants, to state in what, in their opinion, the negligence consisted; but this did not meet with the approval of counsel. His Lordship further stated that he found a difficulty in framing questions on any of the specific acts of negligence relied on by Mr. Chambers. It did not appear to His Lordship that any of the acts relied on by Mr. Chambers were connected with the injury as the cause and effect. The cause was the push from behind, and his Lordship said that he did not see how to frame a question fixing responsibility as to this. M'Grath, K.C., relied on *Martin* v. *Dublin United Tramways Co.* (1). His Lordship thought that case was distinguishable, as in it there was no overcrowding. Eventually Chambers, K.C., tendered the questions which his Lordship left to the jury, and were as follows :—

1. Should the defendants have expected that at Lower Windsor Avenue, having regard to the overcrowded condition of the tramcar, the passengers would proceed to pass hurriedly from the tramcar by the front platform? *Answer*—Yes.

2. If so, did they cause proper precaution to be taken to prevent injury to the passengers so proceeding? *Answer*—No.

3. Was it by reason solely of this failure to take such precautions that the injuries to the plaintiff occurred? *Answer*—Yes.

4. Damages? *Answer*—£250.

(1) [1909] 2 I. R. 13.

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Martin M'Grath, K.C., objected to these questions both as to substance and form.

In charging the jury his Lordship told them that counsel for the plaintiff relied on the combination or concurrence of the acts of negligence which he had specified. If precautions had been taken to avoid one or more, or all of them, the injury would not have happened. It seemed to his Lordship that the direct cause of the plaintiff's fall was the push or pressure from behind, when he had taken up his stand on the step of the front platform, and that unless they could find the Corporation answerable for that act, they should not find for the plaintiff. He told them also that they must treat the third question as if the word "solely" (1) was in it. If they were of opinion that the plaintiff had voluntarily undertaken the risk, or that by his own negligence he had contributed to the occurrence, they should answer the third question in the negative.

The jury found for the plaintiff on all the issues, and his Lordship left both parties to move for judgment.

D. M. Wilson, K.C., and *Thomas J. Campbell* (with them *Chambers, K.C.*), for the plaintiff.

W. Martin M'Grath, K.C., and *Thomas Harrison*, for the defendants.

Nov. 29.

MADDEN, J.:—

The plaintiff, who is an accountant in large business, got on a tramcar at Donegall Place, in the City of Belfast, at about 2.20 p.m. on the 19th of March. His destination was the Linfield football field, where an International match was being played. At that time there was plenty of room, and the plaintiff and his companion took their seats on the top of the car. The tramway line does not lead directly to the football field, which is reached through streets running at right angles to the line. The shortest approach is by Windsor Avenue, at the foot of which there is a pole, indicating a place where tramcars stop by request. The tramcar in its passage towards Windsor Avenue became overcrowded by "a

(1) This word appears inserted in the Registrar's certificate.

constant stream of passengers, sitting on each other's knees, and standing up on aisles, corners filled." It appears that when the stairs at the front of the cars are not intended for the use of passengers they are protected by a collapsible gate, and that the steps from the platform are also put up. When the tramcar reached Edinburgh Street, a street leading from the tramway line in the direction of the football ground, the collapsible gate must have been opened, and the steps let down, for some people got down there by the front stairs. While the car was approaching the next stopping-place, and when it was half over Windsor Avenue, the plaintiff and his companions got up, went to the front stairs, and, descending them, told the motor-man that they wanted to get down. [His Lordship read from the plaintiff's evidence, *ante*, pp. 225, 226.] Mr. M'Conville, who was with the plaintiff, gives substantially the same account of the occurrence.

The evidence given on behalf of the plaintiff establishes, first, that the tramcar was overcrowded, and the traffic along the line congested; secondly, that the motor-man failed to stop the car at the foot of Windsor Avenue, although requested so to do by the plaintiff, this being noted by a pole as a stopping-place by request; thirdly, that the injuries to the plaintiff resulted from his falling from the platform while the car was in motion; fourthly, that the plaintiff's fall was the result of the action of his fellow-passengers, in an impatient and excited condition endeavouring to leave a car in motion. The plaintiff describes himself as "bustled" off the car. M'Conville says he was "crushed off the step." There is no trace in the evidence of individual action on the part of any member of the crowd amounting, as Mr. M'Grath contended, to an assault. I can find no evidence of *novus actus interveniens*." The occurrence was the result of the ordinary action of an impatient and excited crowd as a whole, those in front being "bustled" by those in the rear, with the result that the foremost member of the crowd was "crushed off the step." At all events, it might have reasonably been so regarded by the jury.

The question for our decision is, whether there was evidence before the jury to support their findings, which are as follows:—

[His Lordship read the findings; see *ante*, p. 227.]

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It could not reasonably be contended that there was not evidence to support the answer of the jury to the first question It is a matter of everyday experience that an overcrowded condition of a tramcar or steamboat leads to a rush down the stairs or gangway, which, in the absence of proper precautions, would be a source of danger to passengers. The really important question in the case is—Were proper precautions taken by the defendants to prevent injury to any passenger from the rush which they ought to have anticipated? Two very obvious precautions were suggested. The defendants should have had some person at the usual stopping-place for the football match, to safeguard the exceptional traffic. This duty was realized by the defendants. Their Inspector was present, but, unfortunately, instead of insisting on the car being stopped, he ordered the motor-man to move on in order to relieve the congestion of the line caused by the approach of a number of tramcars. This brings me to the second measure of precaution, the neglect of which is relied on by the plaintiff—failure to stop at Windsor Avenue when requested. On this branch of the case, the decision of the English Court of Appeal in *Hall* v. *London Tramways Company* (1) is of importance. It was there considered that the duty of a Tramway Company to its passengers is to stop when required. The practice, subsequently introduced, of indicating by posts certain points at which the car will stop by request has modified this obligation.

I read from the judgment of Lord Esher, "It was then said that in the circumstances of this case, the plaintiff was guilty of negligence in getting up and going on the footboard before the car stopped. Whether that might be in some cases, I will not say; but here she gave the signal, and saw the driver obeying it. How could it be said that, as matter of law, the Court must hold that the plaintiff must sit still until the car stopped. There was therefore evidence, upon which the jury could find, that the plaintiff was not guilty of negligence."

There is no question in the present case of contributory negligence on the part of the plaintiff. I quite agree that, if there had been evidence of such negligence, the question would

(1) 12 T. L. R. 611.

be open for the consideration of the jury under the third question submitted to them, as it would have been formerly, with proper directions, under the general issue raised by the plea of not guilty. The case has been fully tried by the questions left to the jury by the learned Judge, which, with the answers of the jury, enable us to dispose of the whole case. The plaintiff could not have communicated with the driver otherwise than by leaving his seat and descending the stairs. Arriving there, he found the front platform prepared for his arrival, by the opening of the collapsible gate, and the lowering of the steps. No doubt, in coming forward and descending to the platform, he took the ordinary risk of an accident caused by the normal motion and management of a tram-car; and it rests upon him to establish actionable negligence on the part of the defendants. The cases of *Martin* v. *Dublin United Tramways Co.* (1) and *Roscoe* v. *Same* (2), reported in a note to that case, were relied on on behalf of the defendants. They differ essentially from the case before us, inasmuch as no reasonable notice had been given, in either case, of the passenger's wish to alight. In *Martin's Case* (1) the plaintiff left the interior of the car, "and without invitation went out upon the platform, and commenced to ring the bell, thereby tending to unsteady himself, and place himself in a position of danger" (3). It was held that he did so at his own risk, in regard to an accident caused by the ordinary motion of the car, and that, in the absence of reasonable notice to the conductor of the plaintiff's wish to alight, there was no evidence of negligence on the part of the conductor. The plaintiff, when standing on the platform, was thrown to the road by a swerve or jerk, which was found not to be of an exceptional nature. The facts in *Roscoe's Case* (2) were similar. The question arose upon a motion on behalf of the defendant to remit the action for trial before the Recorder. The motion was granted by this Court upon the ground that the plaintiff's affidavit, in which the facts on which he relied were set forth, disclosed no cause of action. This decision was affirmed by the Court of Appeal, Fitz-Gibbon, L.J., observing, "We can not, to meet the suggestions

(1) [1909] 2 Ir. R. 13.
(2) *Ibid.*, p. 15 n. (1).
(3) *Per* Andrews, J., *ibid.*, p. 42.

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of the plaintiff's counsel, reform the system of the tramway traffic and say that every white post marks a place where preparation should be made by the conductor for every potential passenger's getting in or out. The plaintiff left his seat while the car was in motion, with the object of asking the conductor to stop it. The conductor was not on the platform. There is no evidence of anything unusual or improper or negligent in the manner in which the service was being conducted. The only evidence is that the conductor was not on the platform, and that the car gave a sudden lurch, and the plaintiff was thrown off."

On the whole case I am of opinion that there was evidence upon which the jury were justified in finding that the occurrence was solely attributable to the neglect of the defendants to take reasonable precautions to safeguard their passengers against a danger which they ought to have anticipated, and that judgment should be given for the plaintiff for the amount of damages assessed by the jury.

KENNY, J.:—

At the close of the plaintiff's case the defendants asked for a direction in their favour on the grounds that there was no evidence of negligence on their part, and that contributory negligence by the plaintiff had been established, and, on the learned Judge declining to comply, intimated that they would not offer any evidence. Thereupon, as the Judge experienced a difficulty in framing questions for the jury based on the plaintiff's allegations of negligence, the plaintiff's counsel formulated those which appear in the Registrar's certificate. They were all answered in the plaintiff's favour. The jury find (1) that the defendants should have expected—having regard to the crowded condition of the car—that the passengers would proceed to pass hurriedly from the car by the front platform; (2) that the defendants did not cause proper precautions to be taken to prevent injury to passengers so proceeding: and (3) that it was by reason of their failure to take such precautions that the injuries to the plaintiff were caused.

Dodd, J., states in his report that he told the jury they must treat the third question as if the word "solely" was in it, and that if they were of opinion the plaintiff had voluntarily undertaken the risk, or that by his own negligence he had contributed to the occurrence, they should answer that question in the negative.

The jury have, therefore—as I understand the questions and replies—in effect found that there was a duty cast on the defendants to take precautions against the possible effects of overcrowding; that passing hurriedly from the car by the front platform might reasonably be regarded as one of these effects; that the defendants had made default in taking such proper precautions; and that their default was the *sole* cause of the plaintiff's injuries. If these findings are warranted by the evidence and by law, they dispose of the question of defendants' negligence and of contributory negligence. But with reference to Dodd, J.'s, instruction to the jury that if they found the plaintiff had by his own negligence contributed to the occurrence, they should find against him, I should not wish to be taken as assenting to this formula unless the word "contributed" was accompanied by some such qualifying expression as "directly" or "materially" or "effectively"—so that it would be understood in the sense of *causa causans*, or unless the additional question were put as to the ability of the defendants to avoid by reasonable care the results of the plaintiff's negligence. As was pointed out by the Chief Baron in *Coyle's Case* (1), the plaintiff's negligence might be either *causa sine qua non* or *causa causans*, and whether it could be regarded as coming within the latter category, would depend on whether the defendants could have avoided the results of it. If the opinion of the jury be taken merely as to negligence generally on the part of the plaintiff, without a finding or instruction as to the character of the negligence and its relation to the occurrence, the issue of contributory negligence would, in my opinion, be only half tried. Of course, if there was the further finding that the injury happened *wholly* by the defendants' negligence, to the exclusion of other concurrent causes, the issue of contributory

(1) 20 L. R. Ir. 409, 417.

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negligence would be superfluous and useless. (See the judgment to this effect of Lord Penzance in *Slattery's Case* (1) at p. 1173.) My brother Wright in *Butterly* v. *The Mayor of Drogheda* (2) adopts a similar view to that at which I have arrived. With reference to the case of *Reynolds* v. *Tilling* (3), which influenced the Lord Chief Justice in *Butterly's Case* (2), I may remark that the case does not appear in the regular reports, and that it is not referred to as an authority in either Roscoe on Evidence or Pollock on Torts. In Bevan on Negligence, it is noticed in a foot-note, with the observation, "If, as is suggested, the accident arose from driving a truck into an omnibus, this is a plain trespass, and recondite discussion on contributory negligence is not necessary." In the report of the case in the Court of Appeal there is simply a statement that the appeal was dismissed without calling on counsel for the plaintiff, so that it is impossible to say what view the learned Judges in that Court took of the law as stated by Walton, J. If there was no evidence in the opinion of the Court reasonably fit to go to the jury that the defendants could have avoided the results of plaintiff's negligence, it was immaterial whether the jury answered that question or not.

I have diverged somewhat from the point which we have to determine in the present case, namely, whether there was evidence from which the jury, as reasonable men, might with propriety have answered the questions put to them as they did, or whether the Judge should have directed a verdict for the defendants. There is no doubt that in a clear case it is open to a Judge at Nisi Prius to direct for the defendants on the plea of contributory negligence: see *Coyle's Case* (4), where the Chief Baron, in a closely reasoned judgment, has given the result of the authorities and of the *dicta* of Judges on the subject. What we have to consider is, whether there was a special duty in respect of the conveyance of these passengers cast on the defendants,—if there was, what were its nature and extent: and whether there was

(1) 3 A. C. 1155.
(2) [1907] 2 I. R. at p. 149.
(3) 19 T. L. R. 539; 20 T. L. R. 57.
(4) 20 L. R. I. 409.

a failure in its performance which caused the injuries to the plaintiff.

The defendants are not insurers, but in the carriage of their passengers they are bound to use all reasonable means to convey them safely and to adopt such precautions against injury to them while being so conveyed as human skill, foresight, and care can provide. That, in my opinion, is the measure of their duty. The nature of such precautions must necessarily be dependent on the conditions and circumstances under which the journey of the car is commenced, continued, and completed. One can easily imagine how the circumstances might vary. The line might be undergoing repairs and rails temporarily up—thus necessitating additional precautions, including extra supervision, at the points of repair. So, if the cars carry an unusually large crowd of passengers, it might be essential to make additional provision for their safety. What should the defendants in all reason have anticipated on what I may call a football afternoon, if their cars were allowed to be filled almost to overflowing? Surely the normal conditions of care and supervision where there was no overcrowding might not suffice. A certain amount of excitement and impatience on the part of the passengers as they neared their destination—efforts to make a rapid descent from the car—jostling, bustling, and crushing might all be naturally and reasonably expected. It is not too much to say that such a state of things might eventuate in serious consequences before the cars discharged their human freights, unless measures were adopted to regulate the movements and ensure the safety of the passengers. There is no doubt that on the day in question the car on which the plaintiff had taken his seat was allowed by the defendants to be unduly crowded. The plaintiff states that the passengers were sitting on each other's knees and standing up on aisles, and that the corners were filled. Another witness, M'Conville, says that the car was "packed with people," and Gordon adds that "it was packed, overcrowded." Indeed, it is not, I think, denied that the crowd on the roof was far beyond the seating accommodation. In these circumstances, I am of opinion it would have been a reasonable precaution for the defendants to have had an official either accompanying the car, or to meet it at its destination, whose

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duty it would have been to regulate the descent from the roof to the platform, and prevent the congestion of the latter. There is no evidence of any such safeguard having been provided, but, on the contrary, it is established conclusively that a clear invitation having been offered to the passengers to use this particular platform preparatory to alighting, not only was the exit-gate opened for their departure, but, contrary to their expectation, the car continued in motion beyond the appointed stopping-place. The result ensued that might reasonably have been anticipated. The plaintiff was in front, and the crowd at his back forced him—by pressure of some sort—off the platform, and thereby occasioned the fall which injured his arm. I do not think we have to deal with the case of a deliberate shove or push by any particular individual, —although Dodd, J., refers to the possibility of a "push"—but with the not unexpected result of a car overcrowded with an impatient and impetuous throng. The question of *novus actus interveniens* does not, in the view I take, arise. The "bustling" and "crushing" were the almost inevitable results of the risk which the defendants undertook when they overcrowded their car, and, in my opinion, there was sufficient evidence in the case to warrant the jury in coming to the conclusion that proper precautions were not taken by the defendants to prevent the occurrence which caused the plaintiff's injuries.

As to contributory negligence I do not think it was seriously pressed. Under the circumstances, I do not consider that the plaintiff was guilty of negligence in leaving his seat and descending to the platform; but, even if he was, I take it that the finding on the third question would afford an answer to it. This case is quite distinguishable from *Martin's Case* (1), where there was no suggestion of negligence by the defendants save the failure to stop. The tramcar there, as in the present case, was under no obligation to pull up at a particular point, and if the plaintiff's case here rested solely on the circumstance of the car being in motion, he would not, in my opinion, be entitled to succeed.

I concur in the conclusion of my brother Madden, that the

(1) [1909] 2 Ir. R. 13.

verdict should be upheld, and that judgment should be entered for the plaintiff for the amount of damages found by the jury.

WRIGHT, J., concurred.

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Judgment entered for plaintiff for £250 and costs. Defendants' motion refused with costs.

J. M.

The defendants appealed (1).

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W. Martin M'Grath, K.C., and *Thomas Harrison* (with them *Ronan, K.C.*), for the appellants:—

We objected to any question being left to the jury, as at the close of the plaintiff's case there was, as we contended, no evidence of negligence on the part of the defendants, and even if there were, there was no evidence to connect such negligence with the accident: *Wakelin* v. *London and South-Western Railway Co.* (2); *Coyle* v. *Great Northern Railway Co.* (3); *Martin* v. *Dublin United Tramways Co.* (4). Here, as there, the plaintiff voluntarily left a place of safety, and exposed himself to the risk of standing on the unguarded front platform. If there was overcrowding, it behoved the plaintiff to use extra caution. Especially, where the car was certain to stop within a yard or two from the nearest approach to the football ground, there was no possible excuse for the plaintiff leaving his seat until the car actually stopped. The Road Inspector of the Corporation was a better judge as to the regulation of the traffic than the passengers. When he found the traffic becoming congested, he was quite within

(1) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

(2) 12 A. C. 41. (3) 20 L. R. Ir. 409. (4) [1909] 2 I. R. 13.

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the limits of his duty in calling out to the motor-man to advance the car a short distance in order to free the rails for the cars following, and it is preposterous to describe, or to hold, such a direction by a responsible official of the Corporation as an act of negligence by them. When the plaintiff saw the gate open, it was his duty to return to his seat. If the gate had been shut, the injury to the plaintiff might have been worse, as colliding against the sharp edge of the gate would probably occasion a severer hurt than a fall on the road. The questions left to the jury were dictated by the plaintiff's counsel, who must take all responsibility for them. What are the precautions in the second question which it is suggested the defendants should have taken? The jury were not asked to specify any, and could not have done so. The issue whether there was contributory negligence on the part of the plaintiff was not left to the jury. It is not raised in any intelligible manner by question 3.

D. M. Wilson, K.C. (with him *Chambers, K.C.*, and *T. J. Campbell*), for the plaintiff:—

In *Jackson* v. *Metropolitan Railway Co.* (1) the Lord Chancellor (Lord Cairns), at p. 198, recognized that overcrowding was negligence on the part of a railway company. To the same effect is the view taken by Lord O'Hagan (p. 201). The House of Lords decided against the plaintiff there, because they thought there was no connexion between the overcrowding and the injury to him. Here, according to the evidence, the overcrowding was the *causa causans*—the pressure of the people from behind, and their sudden impact from the jerk caused by the pace being suddenly and unexpectedly quickened by direction of the Inspector. The answer to question 3, coupled with the instruction of the Judge, negatived contributory negligence. The collapsible gate, which had been opened at Edinburgh Street, was evidently left open till Windsor Avenue was reached. The gate should not have been left open while the car was

(1) 3 A. C. 193.

in motion. It was an invitation to outside passengers to prepare to alight, while there was danger in so doing. *Martin* v. *Dublin United Tramways Co.* (1) is quite distinguishable. There the Court held that there was no evidence of negligence on the part of the Tramway Company. That was also the *ratio decidendi* of the Court of Appeal in *Roscoe* v. *Dublin United Tramways Co.* (2). The action of the Inspector in ordering the motor-man to go on after the slackening of speed, and whilst he saw the crowd actually descending, brings the case directly within *Hall* v. *London Tramways Co.* (3). The suggestion that the plaintiff ought to have turned back when he perceived that the gate was open is absurd. How could he re-ascend the stair in face of the descending crowd?

THE LORD CHANCELLOR:—

We have heard the case very fully. We have no doubt on the evidence that the decision of the Court below was right and must be affirmed. The facts are very simple, and they all come round to the collapsible gate of the tramcar being left open. The football match announced provided great attractions. The plaintiff got into the tramcar at Donegall Place (4). There was then plenty of accommodation, but the crowd afterwards so increased that people were sitting on each other's knees and standing in the corners and aisles of the roof. The number of passengers was undoubtedly in excess of what the proprietors of the tramway (the Belfast Corporation) should have allowed. If there is any danger likely to arise from overcrowding, the defendants (the proprietors of the car) and not the passengers are responsible. I think that there is some force in the contention that the defendants should have made some provision for such overcrowding, which might have been expected under the circumstances of the occasion.

(1) [1909] 2 I. R. 13. (2) *Ibid.* 15, note. (3) 12 T. L. R. 611.

(4) A plan of the tramway line and a model of the car were submitted to the Court.

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The car went as far as Edinburgh Street, and there some passengers alighted by the front steps, the collapsible gate being then open, obviously for the purpose of allowing these people to get out. It is plain that it had been closed for safety, and the object of providing it is that it should be kept closed during the journey. It was left open and the steps, which should have been kept up during the journey, were let down.

From Edinburgh Street to Windsor Avenue is a very short distance, and there is no intervening stopping-place. It is clear that the gate having been opened at Edinburgh Street remained open until Lower Windsor Avenue was reached. Windsor Avenue is a natural place to stop at, there being a by-request pole there. The plaintiff asked the motor-man to stop. The motor-man was willing to do so, and he slowed down. Accordingly, the plaintiff proceeded to descend the steps to the platform. Although the speed was slackened, an Inspector called out to the motor-man to go on; but the passengers, thinking that they were to be carried on further than they wished, cried out, "Stop, stop," and this gentleman (the plaintiff) made his way down from the top of the car, not being able to see that the gate was open until he was half-way down. It is suggested by Mr. Martin M'Grath that the plaintiff left a position of safety, and that he ought to have gone back when he saw that the gate was open; but that is absurd. When he got on the platform, he found the gate open and the steps down. The crowd coming behind him forced him on to the road, with the result that he received the injuries for which he now claims damages.

Can it be said that having the gate continuing open was not a negligent act of the defendants? Mr. M'Grath says that if the gate had been shut, there would have been a worse accident. We cannot go into that. Through that open gate the crowd, for which the plaintiff was not responsible, but the proprietors of the tramway were, forced him out. By allowing the gate to be open, they invited passengers to go out by the front of the car, and the accident having occurred by reason of that, I think they are responsible.

I think the case was fairly tried. The first question left to

the jury was—"Should the defendants have expected that at Lower Windsor Avenue, having regard to the overcrowded condition of the tramcar, the passengers would proceed to pass hurriedly from the tramcar by the front platform?" The answer was, "Yes," and the evidence shows that this was exactly what occurred. The second question was—"If so, did they cause proper precaution to be taken to prevent injury to the passengers so proceeding?" They did not because they left the gate open, and the answer of the jury was "No." The third question was—"Was it by reason of this failure to take such precautions that the injuries to the plaintiff occurred?" That question was meant to raise the issue of contributory negligence; and the answer "Yes" negatived contributory negligence, and I cannot find evidence of any.

Under these circumstances, and no evidence having been called for the defendants—a fact which we cannot ignore—we cannot say as a proposition of law that the jury were not right in their conclusions.

HOLMES, L.J.:—

To the first question, namely, whether the defendants should have expected that at Lower Windsor Avenue, having regard to the overcrowded condition of the tramcar, the passengers would proceed to pass hurriedly from the tramcars by the front platform, the answer is, "Yes." I think there is no reason to find fault with this finding. The second question is, Did they take proper precautions to prevent injury to any passenger so proceeding? and the jury answered, "No." When I read those two questions, it occurred to me that I would have liked the jury to have specified the particular precautions which in their opinion ought to have been taken. I find from the notes of Mr. Justice Dodd that he proposed to ask the jury this question, but it was not approved of by counsel for either party. We therefore must investigate the evidence ourselves, and if we find in it anything showing negligence in not taking proper precautions, we must

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uphold the verdict of the jury, although we cannot be sure that it was failure to take the particular precautions, which we think ought to have been taken, which led the jury to find as they did. Using our own knowledge of the mode in which these cars are run, we must recognize that it is most important that the motor-man should, during the journey, be protected from disturbance by passengers going up or coming down by the front platform, and there is always some kind of barrier provided for this purpose. Here it was a collapsible gate. Thus the motor-man remains alone at his post until the journey is ended; and the first thing he then does is to open the front gate. Once the car is stopped, there is no negligence in that, or in a passenger coming down in front, or in the motor-man allowing him to do so. This practice must have been known to the plaintiff. There was a great crowd in the tramcar, but the plaintiff was not in any way responsible for that. When he and his friend got in, they had no difficulty in finding seats. When the tramcar reached its destination, the plaintiff might reasonably assume that it would stop, and that the collapsible gate would be opened; and, being seated near the front of the car, he went down the front stair, believing that up to that time the gate had been kept closed. When he went down, he saw the gate was open. He could not go back, as he was followed, as must be expected under the circumstances, by a considerable number of persons. When the motor-man was stopping the car, the Inspector directed him to go on a little further; and in the excitement that arose, the plaintiff was projected on to the road and injured. There is no doubt that the immediate cause of the injuries sustained by the plaintiff was the open gate, because the accident would not have happened if the gate had been closed; and I am of opinion, that for the motor driver to leave this gate open before the car came to a final stop, was evidence sufficient to justify the jury in answering the second question in the negative.

CHERRY, L.J.:—

I concur. I think that this was a case eminently for a jury, as the questions involved were essentially questions of fact and not of law. It is alleged by the plaintiff that there was negligence on the part of the defendants or their servants which caused the accident; and the evidence relied upon by him depended upon a combination of three circumstances:—

(1.) The overcrowding of the car, which, if it could not be prevented by the servants of the Corporation, ought to have led to extra precaution when the car was stopped.

(2.) The collapsible gate at the forward end of the car being left open instead of being closed, as it usually was: and

(3.) The indecision as to where the car was to be stopped, caused by the interference by the Inspector with the motor-man, in controlling the car.

We cannot attribute the accident exclusively to anyone of these circumstances without taking into account its connexion with the other two; but all three together, in my opinion, produced the result.

As to the overcrowding, it may not have been the proximate cause of the accident, not the *causa causans*, but it undoubtedly was one of the circumstances which led to the accident. All three causes combined produced the state of affairs from which the accident arose. The overcrowding was the *causa sine qua non*, and the open gate was the *causa causans*. Probably if there had been no overcrowding, or if the motor-man had stopped where he originally intended to do, there would have been no accident. But, taking the facts all together, I think that there was evidence of negligence on the part of the defendants' servants to go to the jury, and that there was also sufficient evidence to justify their finding that this negligence was the cause of the accident.

I cannot see that there was any evidence of contributory negligence on the part of the plaintiff to go to the jury, and, therefore, no harm was done to the defendants by the omission of the

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Judge to leave a question to them specially directed to that issue. Their findings upon the issues left to them really involved a finding that there was no contributory negligence on the part of the plaintiff. I can see no reason whatsoever for disturbing this verdict, which appears to me to have been a reasonable one.

Appeal dismissed with costs.

Solicitor for the plaintiff: *Thomas M'Guire.*
Solicitor for the defendants: *Frank Kerr.*

W. G.

THE KING (DUBLIN CITIZENS' ASSOCIATION, AND ANDREW BEATTIE, PRESIDENT) *v.* THE LORD MAYOR, ALDERMEN, AND BURGESSES OF THE COUNTY BOROUGH OF DUBLIN (1).

K. B. Div. 1910. Oct. 26, 27, 28.

Corporation of Dublin—Consolidated municipal rate—Right of appeal to Recorder—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 269—*Rate made in pursuance of illegal resolution—Retrospective rate—Rate good on face*—Certiorari.

An appeal lies to the Recorder of Dublin in respect of the consolidated municipal rate struck by the Corporation of Dublin. Such appeal may be from the whole of the rate, in which case the whole rate may be quashed and a new rate ordered to be struck.

A special meeting of the Dublin Corporation was summoned in December, 1909, on the requisition of seven ratepayers, to consider the question of unemployment in the city, and see what means could be adopted to alleviate same. The notice summoning the meeting stated that it was to consider the requisition which was set out in the notice. At the meeting a resolution was passed that the City Treasurer should be authorized to arrange with the Bank of Ireland for an overdraft of £10,000, and that of this sum there should be allocated to the Paving Committee £7000, Cleansing Committee £2000, and Estates and Finance Committee £1000. The sum of £10,000 was afterwards expended upon useful works. It was not necessary to obtain an overdraft from the bank. In preparing the estimate for the year ending the 31st March, 1911, which was afterwards adopted by the Corporation, and upon which the consolidated municipal rate for that year was struck, this sum of £10,000 was taken into account. Upon an application for a writ of *certiorari* to quash the resolution and the rate :—

Held, that the resolution was illegal and void on the grounds—(1) that the notice of the meeting was not sufficient to enable such a resolution to be passed, (2) that there was no power to borrow money for the purpose mentioned, and (3) that there was no power to apply the funds of the Corporation to the works contemplated by the resolution, being new works not taken into account in the estimate for the year ending 31st March, 1910. But *held* that in the circumstances, and having regard to the fact that an appeal would have lain to the Recorder against the rate, the writ of *certiorari* should be refused.

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

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Quære, does *certiorari* lie to quash a rate where it is good on its face and there is a right of appeal?

Quære, if the rate had been quashed on *certiorari*, could a new rate have been struck for the year?

CERTIORARI.

At a special meeting of the Municipal Council of the County Borough of Dublin, held on the 7th April, 1909, it was resolved that the city rates for the current financial year should be for the north side 10*s.* 10*d.*, and for the south side 10*s.* 6*d.*, in the pound, and that certain sums should be taken off some of the committees, amongst other £800 off the Estates and Finance Committee, £3000 off the Cleansing Committee, and £13,500 off the Paving Committee. The poundage rates were accordingly struck at the above-mentioned sums.

By a notice dated the 8th December, 1909, a special meeting of the Municipal Council was summoned for the 13th December, to consider a requisition addressed to the Lord Mayor by seven ratepayers. The notice set out the requisition, which was as follows:—"That we hereby request your Lordship to convene a special meeting of the Council to consider the question of unemployment in the city, and see what means can be adopted to alleviate same. The City Treasurer and the Borough Surveyor to be in attendance."

The Municipal Council consists of eighty members. Of these forty attended the meeting on the 13th December, 1909. At this meeting a resolution was adopted (37 voting in favour of it, and 1 against): "That the City Treasurer be authorized to arrange with the Bank of Ireland for an over-draft of £10,000; and that the Borough Surveyor be instructed to carry out the estimate of the Paving Committee as proposed in their demand upon the Finance Committee at the beginning of the financial year. That of the proposed £10,000 to be provided, there be allocated to the Paving Committee £7000, Cleansing Committee £2000, and Estates and Finance Committee £1000."

On the 24th December, 1909, the Secretary of the Dublin Citizens' Association wrote to the Town Clerk, stating that

the Association was advised that the resolution was illegal, and that if effect was given to it they would raise the question of illegality.

On the 8th April, 1910, and 13th April, 1910, special meetings of the Municipal Council were held to consider the estimates for the year ending the 31st March, 1911. At these meetings the reports and estimates of the several committees were considered. These estimates included the several sums allocated by the resolution of the 13th December, 1909, described as special expenditure authorized by the Council. In the report submitted by the Estates and Finance Committee on the estimates of the several committees for the year ending 31st March, 1911, the resolution of the 13th December, 1909, was referred to as a supplemental vote of £10,000 to provide work for the unemployed, and it was stated that provision had to be made for this sum in the estimates. At the meetings of the 8th April and 13th April, the estimates of the Estates and Finance Committee, the Paving Committee, and the Cleansing Committee were adopted, subject to a reduction of £1500 on the estimates of the Estates and Finance Committee; and at the meeting of the 13th April, an estimate was submitted for a consolidated municipal rate of £388,197 2*s.* 1*d.* to be raised by a rate of 7*s.* 5*d.* in the £. This estimate was adopted by the Municipal Council, and a poundage rate struck accordingly at a special meeting of the Municipal Council, held on the 4th May.

On the 18th May, 1910, the prosecutors obtained a conditional order for a writ of *certiorari* to remove for the purpose of being quashed, the resolution of the 13th December, 1909, and also the estimate, demand or rate declared and struck at the meeting of the 4th May, 1910, on the ground that the resolution and the striking of the rate were *ultra vires* on the part of the Corporation.

In an affidavit made by Mr. Edmund W. Eyre, the City Treasurer of Dublin, filed by way of cause against the conditional order, it was stated that the sum of £10,000 in question was treated as a series of expenditures in excess of the original estimates for 1909-1910, by the Paving Committee, the Cleansing Committee, and the Estates and Finance Committee. That notwithstanding the resolution, no arrangement was ever made

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with the Bank of Ireland for the over-draft therein mentioned, and no over-draft was obtained, nor was it necessary, as the improvement rate proved to be in credit at all times from the passing of the resolution to the close of the financial year, although the payment of the said sum of £10,000 was provided for. He further stated that the whole of the £10,000 had been expended upon works absolutely necessary and useful, and done at reasonable cost, and that, with the exception of £800 for clearing away snow, all the money was expended on work of permanent utility, and all, if not provided for in the year 1909, would reasonably have been included in the estimates for 1910–1911.

The Dublin Citizens' Association was an Association duly incorporated in pursuance of the Companies Consolidation Act, 1908, having its registered offices at No. 16 Dame Street, Dublin. It consisted of about 400 members, ratepayers of the County Borough of Dublin, paying rates to in or about the annual sum of £50,000. Mr. Andrew Beattie was the President of the Association, and was a ratepayer.

It appeared that the prosecutors had applied to the Attorney-General for his fiat to institute an action in the Chancery Division for an injunction in respect of the resolution of the 13th December, 1909, but that such fiat had been refused.

The present application was on behalf of the prosecutors to make the conditional order absolute notwithstanding cause.

Henry, K.C. (with him, *M'Grath, K.C.*, and *Joseph O'Connor*), for the prosecutors :—

The resolution passed at the special meeting of the 13th December, 1909, and the rate struck on estimates including the expenditure authorized by that resolution, are *ultra vires* and void. In the first place, the notice convening the meeting was insufficient to authorize such a resolution. By the Standing Orders of the Dublin Municipal Council, the requisition must define the purpose for which the meeting is to be convened (Order 3). Where special business is not set down in the notice paper, the Council can proceed no further on it than by a reference to a committee, or to another meeting of the Council, to be held after

three clear days (Order 9). The only purpose set out in the requisition in the present case was to consider the question of unemployment. This could not authorize the passing of a resolution directing expenditure. But even if the notice had been sufficient, the resolution and the rate would still have been *ultra vires* and void, inasmuch as the resolution directs an overdraft to be arranged: *Attorney-General* v. *Corporation of West Ham* (1). This is not a case, as suggested in Mr. Eyre's affidavit, of merely meeting an excess of expenditure over the estimates; it is the case of a rate being struck to carry into effect an illegal resolution. In the report of the Estates and Finance Committee on the estimates for the year ending the 31st March, 1911, this sum of £10,000, authorized by the resolution of the 13th December, 1909, is called a supplemental vote, and it is stated that provision for it had to be made in the estimates. Accordingly, in the estimates of the several Committees among which the £10,000 was allocated by the resolution, the sums so allocated are treated as special expenditure authorized by the Council. The resolution of the 13th December, 1909, is in fact an attempt to rescind the resolution of the 7th April, 1909, reducing the estimates. The rescission of a resolution can only be effected on notice specifying the resolution to be rescinded: Order 25 of Standing Orders. And further, the resolution of the 13th December, 1909, is *ultra vires*, inasmuch as it purports to authorize expenditure not included in the estimates for the year ending the 31st March, 1910. The estimates form the basis of the rate. By section 38 of the Collection of Rates Act, 1849 (12 & 13 Vict. c. 91), the Corporation were required, before the 10th December in each year, to estimate the amount necessary for the improvement rate (now included in the consolidated municipal rate) for the ensuing year, and to transmit the estimate, certified under their seal, to the Collector-General, who was to make and declare the poundage rate according to such estimate (section 48), and to publish notice in the *Dublin Gazette*, and two Dublin papers, stating the amount of the estimates and the poundage rate (section 52). The powers and duties of the

(1) 26 T. L. R. 683.

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Collector-General have been taken over by the Corporation under the provisions of s. 69 of the Dublin Corporation Act, 1890 (53 & 54 Vict. c. ccxlvi); but by sub-sect. 4 of that section the provisions of the Act of 1849 apply to the collection of the municipal rates by the Corporation. Section 50 of the Collection of Rates Act, 1849, shows that a rate may be quashed, except in case of a discrepancy of a trifling amount. [He also referred to *Morton* v. *Brammer* (1).]

Serjeant O'Brien, *K.C.*, and *Ronan*, *K.C.* (with them *Philip A. O'C. White*) for the Corporation of Dublin :—

The Dublin Citizens' Association has no *locus standi*; the Association is not a ratepayer as such. [*Henry*, *K.C.* Mr. Beattie is a ratepayer, and is named as a prosecutor.] There is no jurisdiction to quash the resolution on *certiorari*. It is not an order within s. 130 of 3 & 4 Vict. c. 108; and it is not a judicial act: *The King* (*Vance*) v. *The Corporation of Dublin* (2). Nor will *certiorari* lie as regards the rate. It is good on its face, and is based on a valid estimate, viz., an estimate of £388,197 2*s.* 1*d.* submitted to and adopted by the Council. The so-called estimates of the various committees are merely suggestions of what the estimate should be. These committees have no statutory existence. Assuming the rate to be bad, an appeal could have been taken to the Recorder of Dublin; the consolidated municipal rate includes the rate made under the Public Health (Ireland) Act, 1878, and by section 269 of that Act a right of appeal to Quarter Sessions is given to any person aggrieved by any rate made under the Act. The appeal may be in respect of the whole rate, and the whole rate may be quashed, and in such case the Recorder might have ordered a new rate to be made. If the rate is set aside on *certiorari*, there is no jurisdiction to order a new rate, and, the time for striking the rate having passed, the Corporation would be left absolutely without funds to meet the expenses of the year. *Certiorari* does not lie where a rate is good on its face, and might have been the subject of appeal: Short and Mellor's Crown

(1) 8 C. B. (N. S.) 791. (2) 40 I. L. T. R. 57.

Practice, p. 67; *R.* v. *Justices of Middlesex* (1). The case of *The Queen* (*M'Evoy*) v. *Corporation of Dublin* (2) is distinguishable. In that case there was no right of appeal, and, therefore, no adequate remedy except *certiorari*. In *The King* (*M'Cusker*) v. *Corporation of Belfast* (3) the rate was clearly made without jurisdiction, having been struck upon a wrong valuation. A retrospective rate may be made to meet expenses properly incurred. It is not controverted that in the present case the whole of this sum of £10,000 was spent on necessary works. The rate would have been good if there had been no resolution at all. How can the existence of an invalid resolution make it bad? Having regard to the delay which has taken place, and the public inconvenience which would result from granting *certiorari*, the Court should refuse the application, this being a case in which the issue of the writ is discretionary: *The Queen* v. *Justices of Surrey* (4).

M'Grath, *K.C.*, in reply, referred to *R.* (*M'Kenna*) v. *Urban District Council of Monaghan* (5).

PALLES, C.B.:— Oct. 28.

We regard this as a case of considerable importance. The amount involved is large, £10,000. The principles which we are to apply are far-reaching, but, although tolerably well settled, are often difficult of application.

The object of the application is to quash a resolution and a rate upon the ground that there is included in the estimate on which the latter was struck, a sum of £10,000 which was illegal, and ought not to have been paid out of the rate in question. Admittedly the resolution would not *per se*, if no rate had been struck in consequence of it, have been capable of being impeached on *certiorari*. It was not a judicial act imposing liability, nor was it within any of the statutable enactments which provide a remedy by *certiorari*.

(1) 9 A. & E. 540.
(2) 2 L. R. Ir. 371.
(3) 35 I. L. T. R. 198.
(4) L. R. 5 Q. B. 466.
(5) 38 I. L. T. R. 18.

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The rate is made under a series of Acts, one of which, 12 & 13 Vict. c. 91, prevents, by s. 50, a rate being impeached if the error in its calculation does not exceed one penny in the pound—a provision, strongly and rightly relied on by Mr. Henry, which shows how strictly the rate ought to be confined to the legitimate purposes to which the amount raised can be applied.

The origin of the question is the impeached resolution. It was passed on the 13th December, 1909, and I have no doubt that the Corporation, in passing it, were actuated by the most charitable motives. I do not say whether those charitable motives were motives which ought or ought not to have actuated them in making the rate, but I have no doubt that they acted *bonâ fide* and to the best of their judgment in passing that resolution. I do not make the slightest reflection on the gentlemen who joined in passing it, but in my opinion that resolution was wholly illegal and void. I am of opinion that the notice of the meeting was insufficient to enable the meeting to pass such a resolution; that the meeting was not convened in such a way as to render it legal to pass any resolution which would have imposed a further burden on the citizens, and that even if the meeting had been properly convened the resolution would have been illegal; because under the circumstances there was no power to borrow; and because, even if there had been such power, there was no power to apply the funds of the Corporation at that time to the subject-matter of the works which were contemplated by the resolution. I wish to be very clear on this subject. The provisions of the Dublin Act of 1849, which, to a certain extent, have been abrogated in form by the abolition of the former office of Collector-General of rates, are still in substance existing. It is still necessary that there shall be an estimate for the rate. It is still necessary that on or before the 10th December the Corporation shall arrive at a conclusion as to the estimated expenditure for the next year, and, of course, they must have in their mind, though it may not be necessary that it should be stated in the estimate, the works to which the estimated expenditure is intended to be applied. Bearing in mind that the object of all these limitations on the rating powers is that, so far as legally and

conveniently may be, the expenditure of one year shall be paid out of the receipts of that year, it is plain that it is of great materiality that, where there has been an estimate for an expenditure on a certain subject-matter, say the improvement of certain defined streets, the limitation of the subject-matter in respect of which the expenditure is to take place should be substantially adhered to during the year in which the money is to be expended. I admit that if there be a small and *bonâ fide* excess, the amount may be carried forward into the next year. But the distinction between that case and the present is this, that the effect of the impeached resolution was to introduce wholly new works—works, too, which had been disallowed by the Corporation on their consideration, in December, 1908, of the estimates for the year in question; I therefore agree in the argument of Mr. Henry and Mr. M'Grath that this resolution is wholly illegal.

What, then, were the rights of Mr. Beattie as a ratepayer in reference to that illegal resolution? His plain, obvious remedy was, at the moment that that resolution of the 13th December, 1909, came to his knowledge, and before any money had been expended, to apply to the Attorney-General for liberty to file as relator an information for an injunction, and thus raise the question at once. I cannot entertain a doubt that, if such application had been made promptly, after the passing of the resolution, the fiat of the Attorney-General would have been given. The application, however, was not made for a considerable time, nor until expenditure had been incurred, and (whether it was for this or for some other reason it is not for us to say) the Attorney-General refused his fiat.

What, then, was Mr. Beattie's next remedy? Surely, his next proceeding should have been to have attacked the rate by way of appeal. An appeal to Quarter Sessions is given by sect. 269 of the Public Health (Ireland) Act, 1878, and we are all of opinion that under that section the whole rate may be appealed from, and that upon such appeal there is jurisdiction to quash the whole rate. Had an appeal, therefore, been taken to the Recorder of Dublin, the present question could have been determined by him; and the Recorder would have had power, if he thought fit, to state a case

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for the opinion of this Court; and, whether the ultimate decision in such a proceeding would have been that of the Recorder or of this Court, it would have been attended with this advantage over the present proceedings, that upon that appeal it would have been competent to have directed that a new rate should be struck, so that the public inconvenience would have been much less than that incident to the present proceedings. That second remedy was pretermitted; and now, at the end of October, we are asked to determine that a rate for the city of Dublin struck in the month of April, involving, as I understand, so large a sum as £338,000, a considerable part of which must have been collected, is to be declared void and quashed.

The question is, ought we or ought we not to do this? I assume for the purpose of my judgment that a *certiorari* may issue to bring up and quash a rate in a case such as the present, although the rate is good on its face, and although the Act authorizing it gives a power of appeal against it. I say I assume that there is such jurisdiction, but we do not decide that there is; in fact we have not arrived at a concluded opinion on the subject. The question then we have to determine is, whether, in the exercise of our discretion, we ought to issue this writ. I have arrived at a clear conclusion that we ought not; that the inconvenience attending the quashing of this rate would be so great that we ought not to subject the Corporation and the inhabitants of Dublin to it. The prosecutor has thought fit to let his other remedies lapse, and the doctrine applies *vigilantibus non dormientibus jura subveniunt.* Here there were at least two apt remedies. One was not applied for within the proper time. The other was not resorted to at all.

Were we to quash this rate, there might be an action by each one who had paid his assessment to recover back the amount he has paid, and thus the Corporation would be left without funds. In the old cases in England as to poor rate (and part of this rate is poor rate) it was held that, although a rate was bad, *certiorari* would not issue, not because there was no jurisdiction to issue it, but because the inconvenience would be so great. As it was put in one of the cases, "we cannot allow the poor to starve."

It was suggested on behalf of the Corporation that if we quashed the present rate a new rate could not be struck. I am not to be taken as acceding to that argument. It may be that where a rate is quashed upon *certiorari* there is power to strike a new rate, although the time fixed by the Act for striking the rate is past; but, even assuming this to be so, the inconvenience would still be so great that we ought not to subject the citizens of Dublin to it, simply because Mr. Beattie has thought right to lapse his time for availing himself of more apt remedies.

There may be a question as to what extent the auditor has authority to look into matters of this description. Originally there was no authority in the auditor to consider many matters, such as breaches of trust and cases of that description, and in my judgment in *The Queen* v. *Calvert* (1) I referred to *The Attorney-General* v. *Barrett* (2), which dealt with this point. But this question was put an end to by the amending Act of 1902 (2 Edw. 7, c. 38, sect. 20). I express no opinion as to whether that Act would enable the auditor to give relief here, when auditing the accounts on which the payments made under the resolution of December, 1909, shall appear. That may be discussed afterwards if the occasion arises. What I do say is that if this wrong is left without a remedy it is due to the fault of Mr. Beattie in not having appealed; it may be by his not having applied to the Attorney-General at an earlier period than he did.

Out of respect to Mr. M'Grath's very able argument I wish to say a word in reference to the authorities upon this subject, although when we come to consider the exercise of a judicial discretion, authorities are of little use. Each case must be decided on its own circumstances; however, I should like to add something as to two of the cases referred to, *The Queen (M'Evoy)* v. *The Corporation of Dublin* (3), and *The King (M'Cusker)* v. *Corporation of Belfast* (4).

M'Evoy's Case (3) established two matters—first, that there is jurisdiction to bring up by *certiorari* and quash a rate if illegal.

(1) [1908] 2 I. R. 511, at p. 520.
(2) Ir. R. 3 Eq. 392.
(3) 2 L. R. Ir. 371.
(4) 35 I. L. T. R. 198.

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We are all of opinion that that is now settled law in this country. It was recognized by the Court of Appeal in *M'Cusker's Case* (1). Secondly, *M'Evoy's Case* (2) is an authority upon the question of the exercise of discretion. Fitz Gerald, J., states in his judgment (pp. 381, 382)—"In determining this preliminary question," that is, the question whether *certiorari* lay, "we are influenced by the consideration that if the prosecutor cannot have a *certiorari* the ratepayers are without any sufficiently adequate remedy against a borough rate made contrary to law. The question could not be raised in an action against the Collector-General in the nature of an action for trespass, and the only other remedies would seem to be an action to restrain the Corporation from making a rate; or an action against them as trustees to restrain the levy of the rate if made in abuse of their powers, and to compel a proper application of the trust property." Now, in the present case, there was an adequate remedy, a remedy by appeal.

M'Cusker's Case (1) was a very different one from the present. There the whole proceeding was illegal from beginning to end. The rate should have been struck upon one valuation; it was struck upon another. It would have been impossible that the business of the city could have proceeded on the rate as struck. Even in that case I hesitated, and in my judgment I called attention upon this question of the jurisdiction to quash a rate to the fact of this Court being bound by *M'Evoy's Case* (2), and that we yielded to the authority of that case. I did so in order to bring the matter pointedly under the notice of the Court of Appeal, who were not bound by *M'Evoy's Case* (2). The decision, however, was affirmed by the Court of Appeal. *M'Cusker's Case* (1) differs from the present in that instead of £10,000 only out of £338,000 being illegal, the illegality there permeated every part of the rate.

On these grounds we are of opinion that we ought not to quash this rate. I do not anticipate that the same course will be attempted hereafter, but if it be, the ratepayers will have an opportunity of at once applying to the Attorney-General for his fiat to authorize proceedings to have such a course of

(1) 35 I. L. T. R. 198. (2) 2 L. R. Ir. 371.

proceedings declared illegal. Or, after the rate is struck, there can be an appeal to Quarter Sessions. In that way there will be no lack of opportunity of bringing the law to bear on any action of the Corporation that is alleged to be illegal.

We are of opinion that the Corporation should abide their own costs.

GIBSON, J. :—

I concur. I express no opinion whether *certiorari* is available as a remedy in a case like the present where the rate, valid on its face, and made within apparent jurisdiction, is alleged to be vitiated by the presence of latent illegal items forming part of the total estimate.

Nor do I express any opinion whether, if the present rate was quashed, a new valid rate could now be substituted by the Corporation.

BOYD, J., concurred.

Solicitor for the prosecutors: *E. Ellard Brady.*
Solicitor for the Corporation; *Ignatius J. Rice.*

J. G. T.

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THE KING (REGAN) *v.* JUSTICES OF COUNTY CORK (1).

Justices—Jurisdiction—Service of summons—Last or usual place of abode—Non-appearance—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict. c.* 93), *sect.* 12 (3) *and sect.* 20 (2).

The house where a defendant lodged for a period of six weeks while temporarily employed on work therein is not "his last or more usual place of abode" within the meaning of these words as contained in section 12 (3) of 14 & 15 Vict. c. 93, and to leave a copy of a summons at such a house two days after the defendant has ceased to reside there is not "sufficient" service within the meaning of the said sub-section, nor is such a summons "duly served" within the meaning of section 20 (2) of the said Act.

MOTION by the prosecutor for certiorari and *habeas corpus.*

On October 25, 1910, at the Petty Sessions held at Innishannon, Co. Cork, a summons was heard in which James Regan was prosecuted at the suit of a complainant named Madden for alleged assault. There was no appearance for the defendant, and the magistrates in his absence proceeded to hear and determine the case. The evidence of service produced before the magistrates was that the summons had been left for the defendant at the residence of a Mrs. O'Donohue, with whom he was lodging. In fact, Regan had left Mrs. O'Donohue's house two days previously, and had ceased to reside there. The defendant, who usually resided with his father at the latter's residence in Doneraile, near Buttevant, in the county of Cork, had, for a period of about six weeks prior to the 18th of October, 1910, been employed by Mrs. O'Donohue on some temporary building work in connexion with her house situate near Kinsale Junction, and lodged in the said house while so employed. On the 18th of October the temporary building work being finished, Regan left Mrs. O'Donohue's and returned to his father's place at Doneraile, and on the 20th

(1) Before PALLES, C.B., GIBSON and BOYD, JJ.

day of October, the summons charging him with an alleged assault on the 10th of October was left at Mrs. O'Donohue's house. At the hearing of the summons the Justices were not informed that the defendant had at the time of service ceased to reside at Mrs. O'Donohue's, and had returned to his father's house at Doneraile; but it was sworn by the person who served the summons that it was served at the residence of the defendant. The magistrates thereupon proceeded to determine the charge in the defendant's absence. At the conclusion of the evidence they convicted Regan and sentenced him to one month's imprisonment with hard labour. It was not until his arrest upon the warrant of the Justices issued in pursuance of the conviction that Regan learned of the summons or the conviction.

M'Sweeny (for the prosecutor) referred to sect. 12 (3) and sect. 20 (2) of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93); *The Queen* v. *Webb* (1); *R.* v. *Anwyl, &c., JJ., Merionethshire* (2); *R. (Dickie)* v. *Justices of Donegal* (3); *R.* v. *Farmer* (4).

John Linehan, for the Crown, stated that he appeared merely to inform the Court of what had taken place, and not to oppose the motion.

PALLES, C.B.:—

We think the conduct of the magistrates in this case is above suspicion. They were right in acting as they did on the proof of service before them. But it was not stated to them that this man had ceased to reside in the house. On the contrary, it was sworn by the person who served the summons that the house in question was the residence of the defendant, when, in fact, it was not. Having regard to the two cases cited, viz.: *The Queen* v. *Webb* (1) and *The Queen* v. *Farmer* (4), which it is unnecessary for us to analyse here, and applying to our Petty Sessions Act the doctrines there laid down, we are of opinion that the place where the summons was left was not this man's residence. It

(1) [1896] 1 Q. B. 487. (2) 73 J. P. 485. (3) 44 I. L. T. R. 222.
(4) [1892] 1 Q. B. 637.

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was not his "last" residence, and it was certainly not his "usual" residence. We must therefore order that the decision of the magistrates be brought up upon *certiorari* and quashed, and that the man be discharged.

GIBSON and BOYD, JJ., concurred.

Solicitor for the prosecutor: *E. Fitzgerald.*
Solicitor for the Crown: *Malachy Kelly.*

J. M.

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ATTORNEY-GENERAL *v.* M'CARTHY (1).

Foreshore—Alluvion—Accretions caused by the recession of the line of ordinary high water—When owner of the lands adjoining is entitled to such accretions—Test—"Gradual and imperceptible accretions caused by the action of natural causes."

The decision of the House of Lords in *Gifford* v. *Yarborough* (2) conclusively determines that where land is added to the seashore by the gradual and imperceptible action of natural causes, the owner of the lands adjoining the accretions acquires in them a good title against the Crown, notwithstanding the existence of marks or bounds or other evidence by which the former, or a former, line of ordinary high water can be ascertained.

The real question in every such case of accretion, is whether during the process of accretion the progress of the accretion can be ascertained.

MOTION on behalf of the informant to set aside the verdict and judgment for the defendant at the trial of the action, and to enter judgment for the informant, or for a new trial.

The suit was instituted by an information presented by His Majesty's Attorney-General for Ireland, on behalf of the Crown, to try the title to certain accretions of land formed at a place called the Inch Strand, on the shores of Dingle Bay, in the county of Kerry.

(1) Before PALLES, C.B., GIBSON and BOYD, JJ.
(2) 5 Bing. 163; 2 Bligh (N. S.) 137; 1 Dow. & Cl. 178; 3 B. & C. 91.

The accretions were, as alleged by the informant, formed by the recession of the line of ordinary high water mark at that place, and the defendant, who owned the lands adjoining the foreshore, had exercised proprietary rights over the shore of the bay at the strand, down to the existing line of ordinary high water. It was alleged by the informant that the former line of ordinary high water could be ascertained, as being a line of cliff further inland than the existing line of ordinary high water, and that, therefore, the defendant, in the exercise of the aforesaid rights, had claimed title to what had been bed of the sea, and, therefore, vested in His Majesty the King by his Royal Prerogative and in the right of his Crown. The defendant claimed that, in so far as there had been accretions of land, the same, being formed by the gradual and imperceptible action of natural causes, became added to the lands adjoining the foreshore admittedly in his possession. The information also alleged that the recession of the sea had been assisted by the defendant placing eight wooden posts on the foreshore, which the defendant claimed had been lawfully placed thereon in the exercise of his proper rights as owner of the lands down to the existing line of ordinary high water(1). As the case is of great importance, it is considered expedient to set out below the full text of the material portions of the information, the defendant's answer, and of the reply, as the full facts and matters in issue in the suit will be most easily ascertained from these documents.

The information was as follows:—

Informing sheweth unto their Lordships, John Atkinson, His Majesty's Attorney-General for Ireland, on behalf of His Majesty as follows:—

(1) The object of this information is to have the rights of His Majesty ascertained in respect of the foreshore and accretions hereinafter mentioned, and to have it declared that His Majesty, in right of his Crown, is seised in his demesne as of fee-simple of the said foreshore and accretions, and that the defendant is not entitled to any estate or interest therein, and to obtain an injunction against the defendant in respect thereof, and the defendant decreed to remove four wooden posts by him or his servants in that behalf placed thereon.

(1) This point was abandoned at the trial.

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(2) By the Royal Prerogative, and in right of the Crown, the ground and soil of the coasts and shores of the sea around this Kingdom, including the coast of the county of Kerry, and particularly the Inch Strand forming portion of the Dingle Bay foreshore in the said County, and adjoining and in front of the townlands of Inch and Ardroe, near Annascaul, Parish of Ballinvoher, and Barony of Corkaguiny, and delineated on the map or plan annexed to this information by way of schedule, and thereon coloured red, and the ports, arms, and creeks thereof, and the bed and soil thereof, as well as the bed of the sea adjacent to such coasts, below low water mark, and also the shore line between high water mark and low water mark have been from time immemorial vested in His Majesty and his predecessors, Kings and Queens of England and Ireland, and the same are now vested in His Majesty, his heirs and successors, in right of his said Crown, except in so far as His Majesty or his predecessors, Kings and Queens of England and Ireland, have been pleased to grant part or parts thereof to any person or persons.

(3) His Majesty the King or his predecessors, Kings and Queens of England, have not granted any part or parts of the foreshore between high and low water marks or any accretions adjoining the said townlands of Inch and Ardroe, and which foreshore is shown on the map annexed by way of schedule to this information, and is thereon coloured red, but His Majesty was and is still seised in his demesne as of fee-simple and inheritance in right of his Crown of the same, and His Majesty and his predecessors have always, continuously up to the commencement of these proceedings, exercised acts of ownership of all kinds over the said foreshore, and have made grants in fee of, and a licence (the duplicates whereof have been duly deposited pursuant to the Statute in that behalf) over, portions of the foreshore adjoining, and have also received payments of nominal acknowledgments in respect of several works on the said foreshore.

(4) The defendant, the said Justin M'Carthy, is in possession of the lands adjoining the foreshore in front of the said townlands of Inch and Ardroe, and which said foreshore is delineated on the said map and thereon coloured red.

(5) The defendant, in or about the year 1901, placed eight

wooden posts or stakes on the portion of the foreshore adjoining the said townland of Ardroe, and which said foreshore is delineated on the said map. There remain now existing on the said foreshore four of the said posts or stakes, four others having, prior to this suit, been washed away by the action of the sea. The position of the said posts or stakes with respect to the said foreshore is delineated on the said map by the numbers 1 to 8, the numbers 1, 2, 7, and 8 indicating the position of the posts or stakes now existing.

(6) Prior to the year 1843, the bounds of the ordinary high water mark of the foreshore adjoining the land in the said townland of Ardroe on which the said posts or stakes were placed, was so far as the informant has ascertained, the cliff forming part of the said lands, but by the erection of the said posts or stakes, and also by the action of the wind and of the sea in causing silting and accretion of land, the sea has receded for a certain distance from the said cliffs, so that the sea at ordinary high tides does not advance further landwards than the said posts or stakes, leaving the said original foreshore and what was originally bed of the sea uncovered. The bounds of the said former line of ordinary high water mark are delineated on the said map by the line A B and the present line of ordinary high water mark by the line C D.

(7) Such recession of the sea from the said cliffs has taken place from time to time and is quite perceptible in its progress, and such recession is due to the erection of the said posts or stakes and the action of the sea and the wind.

(8) Even if the aforesaid recession of the sea has been imperceptible in its progress (which the informant denies), the bounds of the said former line of ordinary high water mark are known, and the limits of the land left uncovered by such recession are distinctly ascertained and capable of being laid down.

(9) The defendant, Justin M'Carthy, claims to be entitled to all the foreshore adjoining the said townlands of Inch and Ardroe, which is delineated on the map annexed by way of schedule to this information and thereon coloured red, and particularly to the said accretions of lands caused by the said recession of the sea from the said cliffs, portion of the said townlands of Ardroe, but the informant avers and charges that such claim is not well-

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founded, and that the said defendant is not entitled to any part of the said foreshore or to the said accretions.

(10) The defendant, as the informant avers and charges, caused the said posts or stakes to be erected in order to claim the portion of the foreshore on which they are placed as his property; and immediately before the commencement of this suit, as the informant has ascertained, excluded the public from access to the said foreshore, the subject-matter of this information, and particularly from the portion formerly, but not now, covered by the sea, being the hereinbefore mentioned accretions, for any purpose whatever and still persists in so excluding them, and prevented the public from using the foreshore for any purpose whatever and still persists in so preventing them, and claims to be entitled to do so, and has commenced proceedings by civil bill in the County Court of Kerry, against members of the public for alleged trespass on the said foreshore and particularly on the said accretions, and the defendant still maintains the said wooden posts or stakes on the said accretions, and has refused and still refuses to remove the same, and the informant avers and charges that the said posts or stakes are an injury to the public, and also injurious to His Majesty's title to the premises, by right of his Crown; and by reason of such claim, acts, and conduct of the defendant, the title of His Majesty to the said foreshore is impeached and brought into question, and it is necessary for the protection of His Majesty's possessions, revenues, and rights that the title of the Crown to the said foreshore and to the said accretions should be declared, and that His Majesty and his officers should be secured in the possession thereof, and enabled to exercise the rights of ownership in relation thereto, and that the defendant should be compelled to remove the said wooden posts or stakes from the said foreshore.

(11) Various letters were written for and on behalf of the said defendant to the Board of Trade and to their officers, and by and on behalf of the Board of Trade and their officers to the defendant and to his solicitors, Messrs F. and C. Downing, with reference to the said foreshore and the Crown's rights thereto and the claims put forward by the defendant. No definite conclusion was arrived at as to the alleged rights of the defendant to the said foreshore or accretions or his claim thereto.

(12) The defendant ought to set forth by metes and bounds, and by reference to a map or plan, what part or parts of the said foreshore and accretions of land adjoining the townlands of Inch and Ardroe he claims, and to set forth by what title he claims the same and how he makes out such title.

Paragraph 13 asked for discovery.

The following interrogatories were administered to the defendant by the information :—

(1) Is not His Majesty the King, and whether or not, in right of His Crown or otherwise, and how, seised in his demesne as of fee-simple in the foreshore, lands and premises in front of the said townlands of Inch and Ardroe and delineated on the map annexed by way of Schedule to this information and thereon coloured red, and particularly to the said portion of foreshore or accretions delineated on said map between the lines AB and CD, with all the rights, members, and appurtenances thereto belonging, or how otherwise? and how does the defendant make out the contrary?

(2) Does the defendant claim to be entitled to the said foreshore or some part or parts thereof, including the said accretions, and if so, how does he make out such claim, and also to be entitled to maintain on the foreshore or the accretions the said posts or stakes?

(3) Does not the map (1) annexed by way of schedule to the information correctly show in red colouring the foreshore, the subject-matter of this information, and the position of the said posts or stakes by the numbers 1, 2, 7, and 8; and also, is not the portion of the said foreshore between the said lines AB and CD the portion thereof formed by the said accretions?

(4) Set out what the defendant alleges to be the limits or boundaries of the lands or tenements which the defendant claims to be entitled to, where the same respectively, or any of them, adjoin or adjoins the said foreshore in front of the said townlands of Inch and Ardroe; and set forth what the nature and

(1) See map annexed hereto, which has been copied from that annexed to the information as served upon the defendant. It does not show the position of the posts, which the reporter has been unable to ascertain.

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extent of the right and interest which he claims in or over the said foreshore in front of the said townlands, and how he makes out the same, and set forth how he claims to be entitled to the soil and freehold thereof.

PRAYER.

The Attorney-General, on behalf of His Majesty, prays as follows:—

(1) That it may be declared that His Majesty the King, in right of his Crown, is seised in his demesne as of fee of the foreshore and bed of the sea opposite to the townlands of Inch and Ardroe delineated on the map and coloured red on the said map, and particularly to the portion of the foreshore opposite the said townland of Ardroe in the County of Kerry, which was formerly below high water mark in or about the year 1843, but which is now uncovered at ordinary high tides, and that the boundaries of the said foreshore and of all accretions may be ascertained and distinguished, and that, if necessary, a commission or commissions may issue out of and under the seal of this Honorable Court for the purpose of ascertaining the same.

(2) That the defendant may be decreed to remove the said posts or stakes within such time as this Honorable Court may direct.

(3) That the defendant may be restrained by the order and injunction of this Honorable Court from erecting or maintaining any posts or stakes, or making or committing any other encroachments, purpresture, or waste upon the said foreshore or accretions, or any part thereof; or from preventing the public from using the same; and from purporting to let or deal with, and from taking or continuing proceedings at law or in equity as the owner of the said foreshore and accretions hereby claimed as belonging to His Majesty, and from in any manner disturbing or interfering with His Majesty or his officers in the possession of the same, or any exercise of any right of ownership thereto; and that any part of the said foreshore or accretions of land as are now comprised in any now existing purpresture or encroachment by the defendant, or by any person claiming through him, may be ascertained and seised into His Majesty's hands or arrested to His Majesty's use.

(4) That the informant may have such further or other relief as the case may require.

The Attorney-General hereby waiving all pains and penalties, and forfeitures which may have been or may be incurred by the defendant by his answering the said interrogatories, or anywise howsoever.

ANSWER of the defendant:—

(1) Referring to the map annexed by way of schedule to the information herein the defendant says that the portion of the land in paragraph (2) of the information called the "Inch Strand" delineated upon the said map down to the line of ordinary high water mark, and adjoining and in front of the townlands of Ardroe and Inch, admittedly in the possession of the defendant, is not and never was part of the foreshore, and the defendant says that the said portion of the said land is not now vested in His Majesty, and never was vested in any of His Majesty's predecessors, Kings and Queens of England and Ireland.

(2) The defendant admits, and always admitted, that His Majesty the King is seised in his demesne as of fee-simple and inheritance in right of his Crown of the foreshore between ordinary high and low water mark adjoining the said townlands of Inch and Ardroe, and that his Royal Predecessors, Kings and Queens of England and Ireland, were so seised. As to the acts of ownership alleged to have been continuously exercised over the said foreshore up to the commencement of these proceedings, and the other matters stated relative thereto in paragraph (3) of the information, the defendant is a stranger to all said matters, but he does not and never did deny the same. The defendant, however, does deny that the said acts, matters, or things had any reference to or affected in any way the said before-mentioned part of the said lands delineated on the said map, adjoining and in front of the lands in defendant's possession, down to the line of ordinary high water mark indicated thereon.

(3) The defendant is in possession of the lands referred to in paragraph (4) of the information; and he is also, and has been since the year 1886, in possession of the land coloured red on the said map adjoining and in front of the said land mentioned in the said paragraph down to the said high water mark.

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(4) The defendant admits that he did, in or about the year 1901, cause eight wooden posts to be erected on the lands delineated on the said map, but the said posts were erected on land the property and in the possession of the defendant. In the correspondence referred to in paragraph (11) of the information the Board of Trade was fully informed of the purpose and the occasion of the erection of the said posts. The defendant has no knowledge of the circumstances under which four of the said posts are said to have been removed.

(5) The bounds of the ordinary high water mark of the foreshore adjoining the said lands in the townland of Ardroe on which the said posts were placed were not prior to and up to the year 1843, and never were, the cliff mentioned in paragraph (6) of the information. The defendant says that the sea did not recede from the said cliff as alleged, and the said bounds never extended landward beyond the line marked C D on the said map.

(6) If the sea did recede as alleged (which the defendant denies), and in so far as it did recede, its recession was in no way caused by the erection of the said posts, but was wholly due to the operation of natural causes. Said recession was not, as alleged, perceptible in its progress, but, on the contrary, was slow, gradual, and quite imperceptible.

(7) The bounds of the alleged former high water mark, as referred to in paragraph (8) of the information, are not known, nor are the limits of the land left uncovered by the alleged recession of the sea distinctly ascertained as alleged, or at all, nor are they capable of being laid down.

(8) The defendant contends, notwithstanding the matters alleged in paragraph (8) of the information, namely, that the bounds of the alleged former line of ordinary high water mark are known, and that the limits of the lands left uncovered are distinctly ascertained and capable of being laid down, that, nevertheless, the land is left uncovered by reason of a recession of the sea, slow, gradual, and imperceptible in its progress, due to natural causes, became added to the property of the owner of the adjoining land, and ceased to be vested in His Majesty the King and in his Royal Predecessors.

The defendant also contends that the before-mentioned result

was and would be in no way affected or defeated, even if the said alleged recession of the sea was attributable (which the defendant denies) in any part to the erection of the said posts, inasmuch as the same were lawfully erected by the defendant for a legitimate purpose in connexion with the use by the defendant of land, his property and in his possession.

(9) The defendant repeats that he does not claim, and never did claim, to be entitled to any part of the foreshore adjoining the said townlands of Inch and Ardroe between high and low water mark. He denies, as before stated, that there are any accretions of land caused by the recession of the sea from the said cliffs as mentioned in paragraph (9) of the information; but, in so far as such accretions do exist, the defendant does, for the reasons hereinbefore stated, claim the same, because added to the property and lands of the adjoining owner, and that they are now the property and in the possession of the defendant. The defendant, and his predecessors in occupation of his said lands of Inch and Ardroe, have always and continuously exercised acts of ownership of all kinds over all the accretions particularly referred to, and over the land down to the actually existing ordinary high water mark; have cultivated, used, and improved the same, and have openly taken and succeeded in various legal proceedings against persons who trespassed upon the said lands, including the alleged accretions particularly referred to down to the said ordinary high water mark, taken in virtue of defendant's said possession and ownership of said lands and that of his said predecessors, and to establish his and their title thereto.

(10) The defendant repeats that he caused the said posts to be erected for the lawful purpose stated in the correspondence already referred to, and not otherwise. He never did exclude the public from access to any part of the said foreshore between the actually existing ordinary high and low water mark, nor does he make any claim to do so; and there is a public road directly traversing the lands claimed by the defendant leading to the foreshore, along which, without objection, the public pass thereto and repass. The defendant admits that he has and does exclude the public from trespassing on the lands down to the ordinary high water mark, including the alleged accretions particularly referred to, and that

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he has taken proceedings by civil bill in the County Court of Kerry relative thereto, in the which matters the defendant submits that he was, and is, for the reasons hereinafter stated, acting within his rights. The said posts are not an injury to the public, nor are they injurious to His Majesty's title to the premises whereof His Majesty is seised by right of his Crown, nor is it necessary for any of the purposes stated in paragraph (10) of the information that the said posts should be removed.

(11) The defendant admits and refers to the correspondence referred to in paragraph (11) of the information, and says that it will plainly appear therefrom that the defendant never put forward a claim to any part of the foreshore adjoining and in front of his said lands between the actually existing high and low water marks, but, on the contrary, expressly admitted His Majesty's and His Majesty's predecessors' title thereto.

(12) The lands in question down to the actually existing ordinary high water mark were by Letters Patent of King Charles the Second, dated the 26th day of June, in the eighteenth year of his reign, together with other lands, granted and confirmed by His said Majesty unto Arthur Earl of Anglesea, his heirs and assigns, for ever.

(13) The defendant is seised of and entitled to the said lands down to the said ordinary high water mark under and by virtue of the aforesaid Letters Patent.

(14) The defendant is seised of and entitled to the said lands down to the said ordinary high water mark under and by virtue of a lost Crown grant.

(15) His Majesty, his progenitors, or his Royal Predecessors, Kings and Queens of England and Ireland, have not been in the actual seisin of the lands in question down to the actually existing high water mark, and have not been answered by force and virtue of any right or title to the same, the rents, issues, or profits thereof, or the rents, issues, or profits of any honours, manors, or other hereditaments whereof the premises in question were part or parcel within the space of sixty years before the commencement of thes proceedings.

(16) The defendant and his predecessors, under whom he claims, have held and enjoyed the said lands in question, and have

enjoyed and taken the rents, issues, and profits thereof, by the space of sixty years prior to the commencement of these proceedings.

(17) The defendant, by reference to the matters in the two preceding paragraphs hereof stated, relies upon the provisions of the statutes 48 Geo. 3, cap. 47, and 39 & 40 Vict. cap. 37.

(18) In reply to paragraph (12) of the information, the defendant claims the lands, including the said alleged accretions, down to the ordinary high water mark, as delineated on the said map annexed to the information to which the defendant begs to refer. The defendant claims to be entitled to the lands for the reasons and under the title hereinbefore stated, but as to grants referred to, including that made by the said Letters Patent, the defendant contends that he is not called upon to trace his title to the said grants.

(Paragraph (19) referred to the documents in the defendant's custody and power set forth in the schedule to the answer.)

(20) In answer to the interrogatories contained in the said information, but without admitting the plaintiff's right to require answers thereto, the defendant says:—

(1) His Majesty the King is seized in his demesne as of fee-simple and inheritance in the right of his Crown of the foreshore in front of the said townlands of Inch and Ardroe, and delineated in the said map, between the actually existing high and low water marks depicted thereon, and all rights, members, and appurtenances thereto belonging; but His Majesty is not, for the reasons hereinbefore appearing, to which the defendant refers by way of answer, entitled to the lands particularly referred to in the 1st interrogatory, and therein called the portions of the foreshore or accretions delineated in the said map between the lines AB and CD.

(2) The defendant does not claim to be entitled to the said foreshore between the existing ordinary high and low water marks as delineated in the said map, but he does claim to be entitled to the said lands down to the existing high water mark. The defendant is entitled to the lands claimed by him for the reasons and under the title hereinbefore set forth, but the defendant contends that he is not called upon to make out or trace his title to the grants referred to, including that under the said

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Letters Patent. With respect to the lost Crown grants relied upon in paragraph (14) hereof, the defendant says that the same ought to be presumed from the long-continued and uninterrupted possession of the defendant and of his predecessors of the lands claimed by the defendant, and from his and their before-mentioned acts of ownership over the said lands. The said posts were not nor was any of them placed upon the said foreshore between the existing ordinary high and low water marks.

(3) The map annexed by way of schedule to the said information does appear to show correctly the alleged foreshore, the subject-matter of this information, and the position of the posts numbered 1, 2, 7, 8; but the defendant denies that the land between the lines AB and CD or any part thereof was formed by accretions as alleged.

(4) The defendant claims to be entitled as owner in fee-simple to all the lands delineated in the said map, and coloured red, adjoining and in front of the lands of Ardroe and Inch in his admitted possession, down to the existing ordinary high water mark, shown upon the said map. As to his title to the said land, the defendant refers to the answers hereinbefore given.

(5) The defendant, in reply to the fifth interrogatory, begs to refer to what he has already stated in paragraph (19) hereof, to the schedule of documents hereto annexed, and the affidavit of the defendant relating thereto, as an answer to the said interrogatory.

The defendant for the sake of convenience has, by an affidavit separately sworn on the 12th day of January, 1905, verified his aforesaid answers and the other matters stated in this answer, and the defendant begs to refer thereto.

(21) The defendant respectfully contends that the information ought to be dismissed as against him with costs.

The following reply was delivered on behalf of the Crown:—

"The Right Hon. John Atkinson, for and on behalf of His Majesty, gives this Honorable Court to understand as follows:—

(1) That he joins issue on so much of the answer of the defendant in this suit as does not consist of admissions of the averments contained in the information.

(2) That the foreshore, lands, and premises in front of the townlands of Inch and Ardroe, delineated on the map annexed by way of schedule to the information, and thereon coloured red, and particularly the portion thereof delineated on the said map between the lines AB and CD, was not, nor was any part thereof, granted to the defendant or his predecessors by the Letters Patent mentioned in paragraph (11) of the defendant's answer or by any lost Crown grant.

(3) That the defendant and his predecessors under whom he claims title to the said foreshore, land, and premises, have not nor has any of them held and enjoyed the same or held and enjoyed or taken the rents, issues, and profits thereof by the space of sixty years prior to the commencement of this suit.

(4) That even if the acts of ownership alleged by the defendant in his answer have been exercised and the proceedings therein alleged have been taken by the defendant and his predecessors or by any of them (which the Attorney-General does not admit), the said acts were exercised and the said proceedings taken without the knowledge of His Majesty or his predecessors, his or their servants or agents, and the said acts of ownership were not exercised openly, continuously and without interruption, or as of right by the defendant or his predecessors for a period of time sufficiently long to entitle the defendant to rely thereon in support of the title claimed by him in his answer.

And the Attorney-General for and on behalf of His Majesty submits that the answer of the defendant does not allege any circumstances of law or facts sufficient to defeat His Majesty's title to the said foreshore, lands, and premises or to disentitle His Majesty to the relief sought in this suit against the defendant.

The defendant joined issue upon the information and reply.

The action was tried on the 28th and 29th of October, and the 2nd of November, 1910, in Dublin, before Dodd, J., and a special jury. Several witnesses were examined on behalf of each party. On behalf of the Crown, and as against the defendant's title, reliance was placed on a Landed Estates Court Conveyance of 1867, by which the lands adjoining the accretions in dispute were conveyed to the defendant's predecessor in title. The map

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on the conveyance showed the lands conveyed as not including the strip of land between the lines A B and C D delineated on the map annexed to the information, and alleged by the informant to be respectively the former and the existing line of ordinary high water.

Both parties asked for a direction, but neither the informant nor the defendant took objection to the charge of the learned Judge.

The following questions were submitted to the jury, and answered as is below stated :—

(1) Whether the natural line of high water before the defendant's lands in the parishes of Ardroe and Inch has been varied? Yes. (2) If so, to what extent? We cannot ascertain. (3) Whether the variation (if any) has been slow, gradual, and imperceptible? Yes. (4) Whether there are now on the ground any marks or bounds by which the natural line of high water before such variation can be now ascertained and laid down? No.

The following questions, formulated by the counsel for the informant, were, at the request of counsel, also left to the jury, and were answered as appears below :—

(1) Was the high water mark at the date of the Landed Estates Court Conveyance, 1867, identical with the boundary of the lands thereby assigned, or any part thereof? No evidence. (2) Was the high water mark at the date of the Landed Estates Court Conveyance identical with the base of the cliff in Ardroe? No. (3) Since the date of the said conveyance has there been an accretion to the land? Yes. (4) Has such accretion been perceptible or imperceptible? Imperceptible. (5) Is the extent of the said accretion measured by the boundary on the map on the said conveyance and the existing high water mark? No. (6) What is the extent of the said accretion? We do not know. (7) Can the boundary of the said land comprised in the said conveyance be now ascertained? No.

On these findings judgment was given for the defendant with costs, the following order being made :—

> It is ordered and declared that the foreshore between high and low water mark, as indicated on the map attached to the information, is in His Majesty the King, in right of his Crown, and that the land

above, viz., to the landward side of the line indicated on the said map as the high water mark is not in His Majesty the King, but is in the defendant as owner of the adjoining land, and accordingly that the information be dismissed with costs, and judgment be entered for the defendant with costs.

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The motion to set aside the verdict and judgment was grounded on the following objections stated in the notice of motion :—"That the learned Judge, upon the evidence, should have directed a verdict for the informant; that the learned Judge misdirected the jury; that the verdict was against the evidence; that the learned Judge should have directed on the oral and documentary evidence that there was no defence in law; and that evidence was illegally admitted, and legal evidence rejected."

The Solicitor-General (*Charles O'Connar, K.C.*), and *Serjeant O'Brien, K.C.* (with them *Coll*), for the informant, referred to the following authorities :—*Hale* "*De Jure Maris*" (1); *R.* v. *Yarborough* (2); *Re Hull and Selby Railway Co.* (3); *Scratton* v. *Brown* (4): *Attorney-General* v. *Chambers* (5); *Attorney-General* v. *Reeve* (6); *Foster* v. *Wright* (7); *Hindson* v. *Ashby* (8).

Serjeant Moriarty, K.C., and *A. M. Sullivan, K.C.* (with them *M'Elligott*), for the defendant :—

The Solicitor-General's case is that a surveyor could ascertain along the lands a line corresponding to the boundary of the Landed Estates Court Conveyance of 1867. That conveyance operated on lands bounded by Dingle Bay. Where the boundary is a river, or the sea, a slip by the draughtsman in preparing the map cannot alter the boundary: *Kenny* v. *Labarte* (9). It is argued that because there are metes or bounds showing a former line of ordinary high water which can be ascertained, the doctrine of alluvion does not apply; but this is contrary to the decision in *R.* v. *Yarborough* (2). The onus lies on the Attorney-General to

(1) Cap. 4, Hargreave's Law Tracts, pp. 15 and 28.
(2) 2 Bligh (N. S.), 147; 1 Dow. & Cl. 178; 5 Bing. 163; 3 B. & C. 91.
(3) 5 M. & W. 327.
(4) 4 B. & C. 485.
(5) 4 De G. & J. 55.
(6) 1 T. L. R. 675.
(7) 4 C. P. D. 438.
(8) [1896] 1 Ch. 1.
(9) [1902] 2 I R. 63.

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show that the line A B, on the map annexed to the information, was the former line of ordinary high water. [Counsel referred to *Attorney-General* v. *Chambers* (1), and to Encyclopædia of the Laws of England, article "Foreshore" (2).]

Coll, in reply, referred to Hunt on Boundaries, p. 25.

Cur. ad. vult.

1911. Jan. 23.

PALLES, C.B.:—

The learned Solicitor-General having withdrawn the part of his application which asked us to set aside, as being against the weight of the evidence, the answer of the jury in the negative to the question whether the variation in the natural line of high water was slow, gradual, and imperceptible, the question for decision is, whether Mr. Justice Dodd ought to have directed a verdict for the Crown, upon the ground that it appeared on the undisputed evidence that there were marks or bounds sufficient to show the high-water mark which existed at some former period.

Whether it does so appear on the undisputed evidence is a matter I deem it unnecessary to discuss, as in my judgment the defendant, as owner of the lands adjoining those gained by the gradual and imperceptible action found by the jury, acquired against the Crown a good title to the lands so gained, notwithstanding the existence of marks or bounds or other evidence by which *the* former, or *a* former, high-water mark could be ascertained. The real question in every such case is, in my opinion, whether *whilst the process of recession* was going on, its progress was perceptible. If I am right in this, the verdict must stand.

The case is an interesting one from two points of view. First, it presents a typical instance of a principle of the Roman civil law being introduced into, and becoming part of, the English common law as to real property. Secondly, it shows, if I may be permitted to say so, the length of time during which the application of a principle of law most clearly determined by our highest legal tribunal can remain confused and unsettled by an opinion

(1) 4 De G. & J. 55. (2) Vol. vi., p. 198.

finding its way into the reports, which, although one of a high judicial personage, was an opinion upon a matter unnecessary to the determination of the case before him, upon which he had not had the advantage of any argument at the Bar, and as to which the leading authority was not present to his mind. For these reasons I must be excused for discussing the case, which I deem to be an absolutely clear one, in somewhat fuller detail than I should otherwise have thought necessary.

There is no doubt that Bracton is the earliest writer who treats of the English law upon this subject. His words, in his well-known work, "De Legibus et Consuetudinibus Angliae," lib. ii., cap. ii., page 68, of the first volume of the edition published under the direction of the Master of the Rolls in 1878, are as follows:—

"Item quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio *latens* incrementum, et per alluvionem adjeci dicitur, *quod ita paulatim adjicitur, quod intelligere non possis, quo momento temporis adjiciatur.* Nam etsi tota die infigas intuitum tuum, imbecillitas visus tam subtilia incrementa perpendere non potest, ut videri poterit in cucurbita et similibus."

"Si autem non sit *latens* incrementum imo *apparens*, contrarium erit, ut ecce, vis fluminis partem aliquam ex tuo praedio detraxit et vicini praedio appulit, certum est eam tuam permanere."

There is no doubt that this principle of the English law was borrowed from the civil law. The words with the exception of "ut videri poterit in cucurbita et similibus," are identical with those of the Institutes of Justinian, lib. ii., tit. 1, ss. 20–21. This is the principle upon which the defendant relies; and although Bracton's statement of it refers to the action of rivers only, it is undoubted that so far as it exists in the law of this country it is applicable to the action of the waters of the ocean on the seashore. The Crown does not deny that this doctrine has to some extent been introduced into the common law; but it says that it has been so introduced subject to an exception, for which a passage in Britton may be cited, but for which the main authority is that of Lord Chelmsford, when Lord Chancellor, based upon a

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statement in the well-known treatise De Jure Maris attributed to Chief Justice Hale, and as I do not quite agree in the construction put upon that statement by Lord Chelmsford, I shall refer to the entire passage from which he quotes an extract:—

Hale commences: "For the *jus alluvionis*, which is an increase of the land adjoining, by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees, Bracton, lib. 2, cap. 2, writes thus" (1).

And then he quotes the passage I have read, omitting only the words "ut videri poterit in cucurbita et similibus." Hale then proceeds:—

"But Bracton follows the civil law in this and some other following places. And yet, even according to this *the common law doth regularly hold at this day between party and party*. But it is doubted in case of an arm of the sea, 22 Ass. 93."

He then continues: "This *jus alluvionis*, as I have before said, is *de jure communi* by the law of England the King's, viz., *if by any marks or measures it can be known what is so gained*; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*, as well in maritime increases as in the increases by inland rivers."

Hale does not limit the time at which the knowledge is to be capable of being acquired to that of the acquisition of the land. If he had done so, his statement would have been consistent with the entire of his treatise, which in many parts refers to what undoubtedly was the distinction in the Roman law; the distinction taken by Bracton in the passage Hale had himself quoted a few lines before, between "*incrementum* latens" and "incrementum apparens."

The sentence which I have read, from "This *jus alluvionis*," down to "*idem est non esse et non apparere*," is the passage upon which the Crown relies, and is that which is the foundation of

(1) Cap. vi. ii., Hargreave's Law Tracts, p. 28.

Lord Chelmsford's opinion, which I shall quote later on. That passage, however, is but a part of Hale's statement upon the subject; for he proceeds at once to qualify its generality by adding the words, "But yet custom may *in this case*," that is, even in a case in which by marks or measures it can be known what is so gained, "give this *jus alluvionis* to the land whereunto it accrues. This is *made out very plainly* by these ensuing records."

Hale then quotes two cases, in each of which the defendant successfully defeated the claims of the Crown.

The first of these, that of the Abbot of Ramsey, in the 43rd year of Edward the Third, in the Exchequer, Hale states thus:—"Process went out against the abbot of Ramsey *ad ostendendam causam quare* 60 *acrae marisci in manum regis non debent sesiri, quas abbas appropriavit sibi et domui suae, sine licentiâ regis, super quâdam generali commissione de terris a rege concelatis et detentis*" To this the Abbot pleaded:—"*Quod ipse tenet manerium de Brancaster, quod scituatum est juxta mare, et quod est ibidem quidam mariscus, qui aliquando per in fluxus maris minoratur, aliquando per defluxus maris augetur, absque hoc quod appropriavit sibi prout per praesentationem praedictam supponitur.*" "And issue joined and verdict given for the abbot by *nisi prius* before one of the Barons; *et judicium quod eat sine die, salvo semper regis.*"

As to this, Hale observes:—"Though there were a verdict upon the issue, whether appropriavit or not, yet it is plain that the title stood upon that which the abbot alleged by way of increment. And note, here is no custom at all alleged; but it seems to be relied upon the common right of his case, as that he suffered the loss so he should enjoy the benefit, even by the bare common law in case of alluvion."

The second case was that of the Abbot of Peterborough, in Michs. Term, 23rd Edward the Third. The abbot was questioned at the King's suit for acquiring 30 *acras marisci* in Gosberkile, *licentiâ regis non obtentâ*, and pleaded an immemorial custom:—"*Quod per consuetudinem patriae est a tempore quo*," &c., "*quod omnes et singuli domini, maneria terras seu tenementa super costeram maris habentes, particulariter habebunt marettum et sabulonem per fluxus et refluxus maris secundum majus et minus prope tenementa sua projecta.*" "And upon issue joined, it depended

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many years before the issue was tried." But afterwards, P. 41, E. 3, B. R. Rot. 28, Lincolnia Rex, "*Quod, secundum consuetudinem patriae, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costerae maris adjacentes projecta, &c., Ideo abbas sine die.*"

As to this case, two of Hale's three comments are material, viz.:—

"Observe, 1st, here is custom laid, and he relies not barely upon the case without it."

"3rd, That such an acquisition lies in custom and prescription; and it hath a reasonable intendment, because these secret and gradual increases of the land adjoining *cedunt solo tanquam majus principali*; and so by custom it becomes as a perquisite to the land, as it doth in all cases of this nature by the civil law."

The case which Hale refers to as "22 Ass. 93," is stated on page 6 of his treatise, and relates to a fresh river between the lands of two lords or owners.

As to this case, Hale says:—"And though the book make a question whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to show in the ensuing discourse." Thus, the case itself, as distinguished from Hale's comment upon it, is not an authority upon the present case.

Were I myself to interpret the entire of the language of Hale, irrespective of the assistance derived from *Rex* v. *Yarborough* (1), to which I shall next refer, I should find it impossible to read it as an absolute statement that, according to the law of England, as it existed at the time he wrote, the existence of marks or measures by which that which was gained by alluvion might be known prevented the application of the general law of alluvion, as stated by Bracton.

So far from suggesting that the judgments in the cases of the Abbots of Ramsey and of Peterborough are wrong, he adopts them, notwithstanding the decision in 22 Ass. 93, as making out "very plainly" that custom may give the *jus alluvionis* to the

(1) 3 B. & C. 91; 5 Bing. 163; 2 Bligh (N. S.), 147; 1 Dow & Cl. 178.

adjoining land, and these were cases in which this right was claimed against the Crown. Further, Hale admits that in his time it was the law, "as between party and party," at least as regards inland waters, and that admission involved the custom (whatever it may have been) having existed before the time of memory. He seems to me to be dealing with the extent of the immemorial custom, which had been introduced into English law from the civil law. Did it bind the Crown? And I think his doubt ultimately resolved itself into the question whether the custom was general or local. Upon this distinction he evidently was much affected by the absence from the plea in the Ramsey case of any statement of custom, which would have been essential had it been a local one; and by the custom pleaded and found in the Peterborough case—being a general, and not a local, one—a custom which, had it existed, would have been held to have become part of the common law.

I now come to *Rex* v. *Lord Yarborough* (1). The record in that case set forth an inquisition whereby certain lands formerly covered by the sea were seised into the hands of the King by reason of the dereliction of the sea water. Having regard to the question now raised, it is important to observe that the inquisition showed that the lands seised had fixed and known boundaries on all sides, except where they abutted on the sea. The description was "a piece of land bounded towards the south and south-west by the sea-wall or sea-bank of the said lordship of North Cotes, and towards the north-west by part of the sea-wall or sea-bank of certain lands in the lordship of Titney, and on all other parts by the sea."

It is well known that in a traverse to such an inquisition the traverser must show a good title as against the King (2). Yet the traverse in *Rex* v. *Yarborough* (1) alleged no other matters of fact than the seisin in fee of the defendant in the adjoining manor and its demesne lands; and that the piece of land in question had been formed by the slow, gradual, and imperceptible action of alluvion and accretion of matter cast up by the flux and reflux of the tide, against the outside of the demesne wall; and it relied, as on a

(1) 3 B. & C. 91.

(2) Chitty on Prerog., 366; Staunforde, Prerog. 63 (*a*), 64 (*a*).

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conclusion of law, that it thereby became part of the demesne lands of the manor. It did not deny the existence of marks or bounds, or of the extent of land by which the former high water mark could be known, or that it was, in fact, unknown; and, consequently, if the present contention of the Crown be correct, this traverse would have been insufficient. In that event, the alleged formation by gradual and imperceptible accretion would not, *per se* and without such a denial as I have mentioned, have been a sufficient answer to the title of the Crown, as found by the inquisition. Further, which is more important (as it raises the omission from a mere question of pleading or form to one of the essence of the defendant's title), it could not have been alleged, as a matter of fact, that there were no such marks or bounds, because it was proved at the trial that the land between one of the sea-walls mentioned in the inquisition and another sea-wall, still more remote from the sea, was formerly covered by the sea; and, therefore, at least one of the existing sea-walls must have been a sufficient mark of former high water. The Crown did not demur to the traverse. Its replication treated the traverse as sufficient, and merely traversed that the land had been formed in the manner alleged. There having been a verdict for the defendant at the trial, the case came before the King's Bench upon a motion for a new trial. Of course, upon that motion, the question whether the pleadings were correctly framed was not before the Court; but Lord Tenterden, in giving judgment, in very pointed words, which cannot have escaped attention upon the argument in the House of Lords of the subsequent writ of error, upon which the very question discussed here was open, calls attention to the allegation in the traverse, which he says regards only the manner in which the land had been formed, "and contains nothing as to the practicability of ascertaining, after its formation, *by any marks or limits, or quantity previously* existing or *known*, or by measure to commence and be taken from such marks, or with reference to such quantity, how much is now land that once was sea" (1).

The decision of the King's Bench was in favour of the defendant; but by agreement between the parties the facts were stated in a special case, on which judgment was entered *pro formâ*, which

(1) 3 B. & C. at pp. 105, 106.

was brought up by a writ of error to the House of Lords. The error assigned was that it appears by the record that the land was gained from the sea by alluvion, but the defendant did not allege any custom or acts whereby the title of the King to the land so gained was barred or defeated; and that the matters alleged by the traverse were not sufficient in law to bar such title of the King.

Upon the argument, Sir Nicholas Tindal, then Solicitor-General, was one of the counsel who appeared for the Crown. There are reports by three different reporters of the decision in the House of Lords of the appeal under the name of *Gifford* v. *Lord Yarborough*, viz., those in Bingham (1), Bligh (2), and Dow and Clark (3). The Judges were called in, and their unanimous opinion was read by Lord Wynford (then Best, C.J.); and it and the opinions of the Lord Chancellor (Lyndhurst), and of Lord Eldon, appear in each of the reports; but all of them are sadly deficient as regards the arguments of counsel. In Bingham they are wholly omitted. Neither Bligh nor Dow and Clark purport to give them; but the report in Bligh contains some observations attributed to the Lord Chancellor during the course of the argument, which appear to be more like a discussion between his Lordship and some of the counsel (4). At page 154, the Lord Chancellor is reported to have stated that Lord Hale obviously interprets the expression "*secundum patriae consuetudinem*" to mean the custom of the district. The common form of declaration is "according to the custom of the realm." "That is very analogous to secundum consuetudinem patriae. Secundum consuetudinem patriae means the custom of the entire country." "In the case of the Abbot of Ramsey the following passage occurs in the judgment:—Secundum consuetudinem patriae . . . fluxus et refluxus maris, &c. Nothing can be more general than that." He also refers to *The King* v. *The Bishop of Winchester* (Staunforde, Prerog., tit. Traverse, c. 20, 63), that the defendant in such a case must in his traverse state his own title.

The question put to the Judges mentions the mode of the formation of the land, as stated in the traverse, and concludes

(1) 5 Bing. 163. (2) 2 Bligh (N. S.), 147. (3) 1 Dow (N. S.), 178.
(4) 2 Bligh (N. S.), 154.

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with the words—"Does such piece of land, so formed, settled, grown, and accrued as aforesaid, belong to the Crown, or to A., the owner of the said demesne lands? There is no local custom on the subject" (1).

The answer of the Judges to this question, which was delivered by Best, C.J., is elaborate and closely reasoned. It begins with the statement that the right of the Sovereign to land once covered by the sea may, in particular places, or under particular circumstances, in all places near the sea, be transferred to certain of his subjects by law; that such a law may be presumed from either a local or a general custom, such custom being reasonable, and proved to have existed from time immemorial, and which, if general, need not be pleaded.

They then stated the ultimate conclusion at which they had arrived; that there is a custom by which land from which the sea is gradually and imperceptibly removed by the alluvion of soil becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the King. The Lord Chancellor and Lord Eldon, the only Law Peers who heard the argument, agreed in this conclusion; and, accordingly, the judgment of the King's Bench was affirmed.

I cannot doubt that this adjudication is a conclusive determination that the traverse of the defendant in that case was good in law; and accordingly that it establishes, as against the Crown, the absolute right of the owner of lands adjoining the sea to any accretion thereto which accrues by the gradual and imperceptible action of "alluvion"; and I hold that, after that determination, it is not competent to us, or to any Court, to hold that this right is conditional upon the non-existence of marks sufficient to designate the former high water mark.

An examination, however, of the reasons of the opinion of the Judges carries us much further—further than, in my judgment, we have any right to inquire. But if we do inquire, we find that these reasons are inconsistent with the right acquired by alluvion being conditional upon the absence of marks or of knowledge of the former line of tide. I therefore, but not without some hesitation, refer to those reasons.

(1) 5 Bing. 163.

To prove that the custom was valid, these reasons proceed to show—

1. That such a custom was reasonable;

2. That it was beneficial to the public; and

3. That its existence from time immemorial was established by satisfactory legal evidence.

To show that the custom was reasonable, the Judges call attention to the difference between land formed by alluvion and derelict land. "Land formed by alluvion," they say, "must become useful soil by degrees too slow to be perceived, Little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. . . . Unless trodden by cattle, many years must pass away before land formed by alluvion would be hard enough or sufficiently wide to be used beneficially by anyone but the owner of land adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining land will give them consistency by treading on them, and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide, the owner of the adjoining lands may render them productive. Thus lands which are of no use to the King will be useful to the owner of the adjoining land, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz., by occupation and improvement." (1). "The reasonableness," they add, "is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea" (2).

The custom is shown to be beneficial to the public in these words.

"Much land which would remain for years, perhaps for ever, barren, is, in consequence of this custom, rendered productive. As soon as it is formed, although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use. But, in the meantime, the owner of the adjoining land will have acquired a title to it by improving it. The original deposit constitutes

(1) 5 Bing., at p. 165; 2 Bligh (N. S.), at pp. 158, 159.
(2) 5 Bing., at p. 166; 2 Bligh (N. S.), at p. 159.

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not a tenth part of its value; the other nine-tenths are created by the labour of the person who has occupied it; and in the words of Locke (in a passage previously mentioned), 'the fruits of his labour cannot, without injury, be taken from him'" (1).

On none of these reasons has the fact whether the former high water mark was known or unknown any bearing.

It remained to show that the custom was an immemorial one. To establish this by legal evidence, they commence by reading the passage in Bracton I have already quoted; and also the passage from Lord Hale, "that Bracton follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties, but it is doubtful in case of an arm of the sea." Then the opinion of the Judges proceeds.

"It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institutes, lib. 2, tit. 1, s. 20. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the Crown and a subject should not be decided by the same rule. Bracton wrote on the law of England; and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings. . . . Wherever Bracton got his law from, Lord Chief Baron Parker, in Fortescue, 408, says, 'As to the authority of Bracton, to be sure many things are now altered, but there is no colour to say it was not law at that time. There are many things that have never been altered, and are now law.' The laws must change with the state of things to which they relate; but, according to Chief Baron Parker, the rules to be found in Bracton are good now in all cases to which those rules are applicable. But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down is to be found in 2 Roll's Abridgment, 170; in Comyn's Digest, tit. Prerogative (D. 61); in Callis (Broderip's Edition), p. 51; and in 2nd Blackstone's Commentaries, 261." (2).

(1) 5 Bing., at p. 166; 2 Bligh (N. S.), at pp. 159, 160.

(2) 5 Bing., at pp. 167, 168; 2 Bligh (N. S.), at pp. 160, 161.

Then, *inter alia*, the judgment in the case of the Abbot of Peterborough is cited from Hale, with the remark, "In the treatise of Lord Hale it is said, 'here is custom laid, and he relies not barely on the case without it.' But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such a statement would have been necessary if the custom pleaded were local. The *consuetudo patriae* means the custom of all parts of the country to which it can be applied: that is, in the present case, all such parts as adjoin the sea" (1).

This judgment, to my mind, conclusively settled the law on the question here. As against it neither Britton nor the anonymous case in the Year Book is of any avail, nor was it competent to any Court, subsequently, to treat it as a matter to be discussed. It was given in 1828; and I cannot find that this alleged exception to the doctrine of accretion vesting the newly formed land in the owner of that which is adjoining was suggested, until the year 1839, when in the *Hull and Selby Railway Case* (2) a question was raised whether the doctrine affirmed by the House of Lords applied in favour of, as well as against, the Crown. The statement there was, that "the sea had encroached, by slow and imperceptible progress, so that no particular period thereof can be ascertained, but within living memory there has been a much greater portion of it unwashed away than there is at present." Sir F. Pollock, for the former owner, relied upon the passage in Hale: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, *but so that yet there be reasonable marks to continue the notice of it*, or though the marks be defaced, yet, if by situation and extent of quantity and bounding the firm land, or if by art the same can be known, if by art and industry this land be regained, the subject doth not lose his property." The Chief Baron (Lord Abinger) said, "In all cases of gradual accretion which cannot be ascertained *from day to day*, the land so gained goes to the person to whom the land belongs to which the accretion is added; and *vice versa*. That is the rule, as between subject and subject"; and he proceeded to

(1) 5 Bing., at p. 168; 2 Bligh (N. S.), at p. 162. (2) 5 M. & W. 327.

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hold that it also applied in favour of the Crown against a subject. Alderson, B., held that the question was precisely the same, whether the claim was made against the Crown, or the Crown's grantee. The fact that it could be shown that the water had, in former times, extended so far, was treated by the Court as immaterial.

Next in order of time comes the case mainly relied on by the Crown; indeed, without it the case made by this information would not have been arguable: *The Attorney-General* v. *Chambers* (1). The real question for decision there was whether the rule of law as to alluvion was applicable to a case in which it had been the result, not of natural, but of artificial causes. Upon this question, the decision of the House of Lords in *Gifford* v. *Lord Yarborough* (2) apparently had no bearing; and it was probably for this reason that, although the ablest counsel at the bar appeared in the case, that decision in the House of Lords was not cited, although the decision of the King's Bench in the same case under the name of *Rex* v. *Yarborough* (3) was cited, and apparently accepted by the learned counsel as good law. The mode in which the Lord Chancellor was brought to express the opinion relied upon here for the Crown was, that in reference to the statements of the witnesses for the Crown, that the alluvial land in question had been added to the mainland, not gradually and imperceptibly, but rapidly, he says: "But if the witnesses merely mean that, at the expiration of some period of time, they could perceive the changes that had taken place, although they could not determine them in their progress, then, *I think*, another important question *may* arise, and *may* call for determination, as to *whether circumstances may not exist* in which, though the changes were gradual, yet the original limits of the Crown's right and of that of the owner of the adjoining land are now capable of being distinctly ascertained" (4). He then proceeds to say that a passage in the judgment of Lord Tenterden in *Rex* v. *Yarborough* (3) is not in accordance with the great authority upon this subject, Lord Hale. He quotes the passage relied upon for the Crown, but without the qualification

(1) 4 D. G. & J. 55. (2) 5 Bing. 163; 2 Bligh (N. S.), 147; 1 Dow & Cl., p. 178. (3) 3 B. & C. 91. (4) 44 D. G. & J., at p. 70.

of it which I have mentioned; and adds: "Where the limits are clear and defined, and the exact space between those limits and the new high water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible; why should a rule be applied which is grounded upon a reason which has no existence in the particular case?" (p. 71). He then directs certain issues to be tried; and observes at the conclusion of his judgment: "Until these facts are determined, it is not in my power to dispose of the important questions which these informations involve; although I have thought it right not to withhold my opinion upon some of the questions which were raised in the course of the argument" (p. 73).

It seems to me that it is impossible to read the entire of this judgment without coming to the conclusion that the Lord Chancellor was not aware of the decision of the House of Lords in *Gifford* v. *Lord Yarborough* (1). As against that decision, the opinion of the Lord Chancellor, even if it had formed the basis of his judgment, would have been simply ineffective. But in the *Attorney-General* v. *Chambers* (2), the Lord Chancellor, instead of deciding any question of law, merely directed issues. His statement of the law was, therefore, a *dictum* merely—an unfortunate *dictum*—as it has found its way into text-books, is always quoted in cases such as the present, and has had a most unsettling and confusing effect on the administration of the law.

I pass over some cases which I regard as immaterial, including *Scratton* v. *Brown* (3) (in which an estate in the sea-shore is spoken of as a movable freehold), *Ford* v. *Lacy* (4) (the decision in which did not turn on the doctrine in question here); *Attorney-General* v. *Reeves* (5) (which related to recessions of the sea which were apparent); *Mercer* v. *Denne* (6) (which held merely that land added by accretion was subject to the incidents of that to which it was added); and *Mellor* v. *Walmesley* (7) (which does not bear at all upon this case).

I come, then, to the instructive judgment of Lord Lindley,

(1) 5 Bing. 163; 2 Bligh (N.S.), 147; 1 Dow & Cl. 178.
(2) 4 D. G. & J. 55.
(3) 4 B. & C. 485.
(4) 7 H. & N. 151.
(5) 1 Times L. R. 675.
(6) [1904] 2 Ch. 534.
(7) [1904] 2 Ch. 525; [1905] 2 Ch. 164.

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in *Foster* v. *Wright* (1), delivered in 1878, when he was a Judge of the Common Pleas Division, a judgment which would probably have rescued the law from the effect of the *Attorney-General* v. *Chambers* (2), were it not, that in 1896, in a judgment in *Hindson* v. *Ashby* (3), he was induced to use expressions which are alleged—but erroneously as I believe—to qualify some parts of it. *Foster* v. *Wright* (1) was a case in which the plaintiff, as lord of a manor, was entitled to a several fishery in the waters of the manor through which flowed the river Lune, which was neither tidal nor navigable. At one time this river flowed wholly through lands of the plaintiff; but eventually, by gradual progress, not visible, but periodically ascertained, it encroached on the defendant's lands. The extent of the encroachment could be defined; and the question was whether the several fishery of the plaintiff continued to exist in the part of the river which flowed over the defendant's land. Lord Lindley, in giving judgment for the plaintiff, bases his opinion upon the proposition that "Gradual accretions of land from water belong to the owner of the lands gradually added to," and for this he relies on *Rex* v. *Yarborough* (4), and refers to the decisions of that case, not only in the King's Bench, but in the House of Lords, under the name of *Gifford* v. *Yarborough*, as reported in 5th Bingham. He then states the converse proposition, that land gradually encroached upon by water ceases to belong to the former owner, for which he cites the *Hull and Selby Railway Company Case* (5). He then proceeds to say that our "Law on this subject is based upon the impossibility of identifying, from day to day, small additions to or subtractions from land caused by the constant action of running water; that "the history of the law shows this to be the case," and that "the general doctrine, and its application to non-tidal and non-navigable rivers, in cases *where the old boundaries are not known*, was scarcely contested by the counsel for the defendant, and is well settled" (6). As to the contention that the doctrine did not apply to such rivers where the boundaries were not lost, he says that in support of it passages in Britton, in the Year

(1) 4 C. P. D. 438.
(2) 4 D. G. & J. 55
(3) [1896] 2 Ch. 1, 12.
(4) 5 Bing. 163; 3 B. & C. 91; 2 Bligh (N.S.), 147; 1 Dow & Cl. 178.
(5) 5 M. & W. 327.
(6) 4 C. P. D., at pp. 446, 447.

Books, and in Hale, De Jure Maris, were referred to; that Britton lays down, as a general rule, that gradual encroachments of a river enure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding, "if certain boundaries are not found"; and that the same qualification is found in 22 Ass. pl. 93, the case to which I have already referred. His answer to this is that, curiously enough, this qualification is omitted by Callis in his statement of the same case; that on the passage in Hale being brought to the attention of the Court in *In re Hull and Selby Railway Co.* (1), the Court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests; that Lord Tenterden's observations in *Rex* v. *Yarborough* (2) were also in accordance with this view; and that although Lord Chelmsford, in *Attorney-General* v. *Chambers* (3) doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Railway Co.* (1), which decided the point so far as encroachments by the sea are concerned. He adds: "Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal, or navigable and non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other water (De Jure Maris, page 6). The question does not depend on any doctrine peculiar to the Royal prerogative, but on the more general reasons to which I have alluded above" (3).

In result, then, he applies the decision in the *Hull and Selby Railway Co.* (1), in relation to the sea, to that before him—the case of a river; and assuming that the plaintiff's right to fish in the Lune depended on his ownership of the soil of the river's bed—a matter he had decided in a previous part of his judgment—he states his opinion that the plaintiff has that right in the river flowing in its new bed, "for if he was the owner of the old bed of the river, he has *day by day and week by week* become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired

(1) 5 M. & W. 327. (2) 3 B. & C. 91. (3) 4 C. P. D., at p. 448.

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cannot be defeated by proof that a portion of the bed *now capable of identification* was formerly land belonging to the defendant or his predecessors in title" (1).

It is strange that he does not place express reliance upon the House of Lords' decision, but he implicitly acts upon it, by following the *Hull and Selby Case* (2), of which the former was the basis.

Lord Coleridge, although not agreeing in the judgment of Lord Lindley in its entirety, did agree to the portion material here. He says (p. 449):—

"If the whole soil over which the river Lune flows passed by the first grant, and after the death of Colonel Charteris, by the second, to the predecessor in title of the plaintiff, I think the consequence, as to the accretion which my brother Lindley draws from that premise, does in legal reasoning follow from it."

Hindson v. *Ashby* (3) was the case of a non-tidal stream and was decided on the fact that the strip of land in question had not ceased to form part of the bed of the river, and, therefore, does not touch the question here. A reference, however, by Lord Lindley to his judgment in *Foster* v. *Wright* (4) is relied on by the Crown. His words are:—

"In *Foster* v. *Wright* (4) it was decided that the owner of a several fishery had the exclusive right to fish in a river which had gradually encroached upon and into the land of a riparian proprietor, *the limits of whose land were known*. This decision was, in my opinion, quite right, although in one part of my judgment *I may, perhaps*, have gone too far" (5).

I suppose he refers to his application to a non-tidal stream, of the rule laid down as to the sea-shore in *Gifford* v. *Yarborough* (6).

In *Hindson* v. *Ashby* (3) Lord Justice A. L. Smith, after referring to Lord Lindley's judgment in *Foster* v. *Wright* (4), to Lord Chelmsford's in *The Attorney-General* v. *Chambers* (7), and to the report of *Rex* v. *Yarborough* (8) in the King's Bench; and, strangely enough, omitting to mention the decision in that case in the House of Lords, says:—"It cannot be denied that authority

(1) 4 C. P.D., at pp. 447, 448.
(2) 5 M. & W. 327.
(3) [1896] 2 Ch. 1.
(4) 4 C. P. D. 438.
(5) [1896] 2 Ch., pp. 11, 12.
(6) 5 Bing. 163; 3 B. & C. 91; 2 Bligh (N. S.), 147; 1 Dow & Cl. 178.
(7) 4 D. G. & J. 55.
(8) 3 B. & C. 91.

is to be found in the books . . . which would lead to the conclusion that, in a case with such metes and bounds ever (*sic*) existing, the doctrine of accretion would not apply" (1). He then states that he agrees with Lord Lindley's decision in *Foster* v. *Wright* (2); but he distinguishes it from that then before him, by holding that, in the latter, the increase was not gradual and imperceptible; and, to show that it was not so, he quotes the following passage from the summing up of Willes, J., in *Lloyd* v. *Ingram* (3), in which that great master of the common law states the principle in the following words:—

"If, by gradual and imperceptible accretions in the ordinary course of the operations of nature, land is added on by slow degrees to the sea-shore, *notwithstanding that after a certain period a body of land, however considerable*, has accrued to the shore, yet if the steps by which the land is formed are steps gradual and in the ordinary course of nature, and happening from time to time, but you cannot perceive the changes *from step to step* (if one may use that figure), the new land, so gradually and imperceptibly accrued, does belong to the owner of the shore, and is given to him by the law as his property" (4).

In my opinion, this is the true principle, and is antagonistic to that laid down by Lord Chelmsford in *The Attorney-General* v. *Chambers* (5). Lord Justice Kay, in his judgment in *Hindson* v. *Ashby* (6), does not refer to this question. This case, therefore, if at all applicable, is an authority, not for, but against, the Crown.

The cases which have been referred to from the second volume of the Chancery Reports for 1904 and 1905 do not seem to me to bear directly upon the question here, and I deem it unnecessary to discuss them here.

I desire to say that I have referred to the cases subsequent to that of *The Attorney-General* v. *Chambers* (5) because they have been dealt with so fully during the argument. But I base my judgment solely upon the decision of the House of Lords in *Gifford* v. *Yarborough* (7). It cannot derive, nor does it require, any

(1) [1896] 2 Ch., pp. 27, 28.
(2) 4 C. P. D. 438.
(3) Separately reported in 1868.
(4) [1896] 2 Ch., p. 29.
(5) 4 D. G. & J. 55.
(6) [1896] 2 Ch. 1.
(7) 5 Bing. 163; 3 B. & C. 91; 2 Bligh (N.S.) 147; 1 Dow. & Cl. 147.

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confirmation from decisions of Courts or Judges of less authority; and I do not feel at liberty, when a question has been made the subject of decision by that august tribunal, to do more than follow it.

Upon this ground, I am of opinion that the judgment given by the learned Judge at the trial was right; and that the application by the Crown to change it should be dismissed with costs.

GIBSON, J.:—

The defendant admitting the title of the Crown to what is the foreshore, the onus lies on the Attorney-General to establish where the medium high water mark line is to be drawn. The Solicitor-General admits that there was evidence to support the findings as to the imperceptible character of the alluvion, and the impossibility of fixing the date or dates when such alluvion took place; he does not ask for a new trial, but he contends—(1) that the original boundaries of the land now vested in the defendant are ascertainable, and ascertainable either by natural features or by documentary proofs, maps, &c.; and that (2) the doctrine of alluvion has, therefore, no application. Defendant's counsel contest both propositions.

The physical boundary being the sea, it would, in fact, be fluctuating in its nature, as is stated in a Scotch case, cited with approval by Lord Watson; and when the sea gradually recedes, the physical boundary shifts accordingly. Hence the expression "movable freehold" in *Scratton* v. *Brown* (1).

Like my Lord, I am not satisfied that the original boundaries can be ascertained, but I shall deal with the case on that assumption. I confine my judgment to two questions of law: (1) assuming that the original boundaries are ascertainable and ascertained, is the principle of accretion by insensible alluvion thereby excluded? (2) assuming that the accretion, or the portion accrued, before the date of the defendant's instruments of title, are not included in such instruments, is title in the Crown thereby established?

Where the movement of water is sudden or temporary, property

(1) 4 B. & C., p. 485.

is not changed, and consequent accretion, dereliction, or avulsion, as regards rights and their effectual enforcement, are naturally influenced by the presence or ascertainability of the original coast-line or boundary marks. But, where the process of change is gradual and imperceptible, the importance of the original limits or measures is by no means the same, the accretion being a "perquisite" or an "incident" or "accessory," attached to and added to the original territory of the owner.

Bracton, however, after stating the law as to alluvion in the language of Justinian, lays down that alluvion does not apply "in agris limitatis." In this he merely copies the Digest, which excludes "agri limitati" and "agri assignati" from the benefit of alluvion. The latter expression appears to describe territory acquired by the State and parcelled out in lots among "coloni"; the former points to measurements and boundaries proper. The parcels, so allotted, could not be altered in dimensions by alluvion; where the boundaries were natural features, such as a river, and there was no certain measure, it was otherwise. This exception of Bracton's is not referred to in *Lord Yarborough's Case* (1), or in later authorities.

I am not aware of any English authority discussing the meaning of "agri limitati," but it is not improbable that the reference to marks, &c., in old books and cases is influenced, in some degree, by Bracton's exception, as well as by some inaccuracy of expression in dealing with the law applicable to sudden invasion or dereliction, or accretion by the sea. Thus, in *Yarborough's Case* (2) sudden dereliction is contrasted with alluvion. In the report in 1 Dow and Clark the word "sudden" is omitted. I do not think that either Bracton or the Digest, in excluding alluvion in the case of "agri limitati"—whatever that may mean—can be accepted as guides to existing English Common Law.

It is unnecessary to discuss the explanation of the doctrine of imperceptible accretion in English law, whether it is "de minimis non curat Rex" (Callis), or "de minimis non curat Lex (Blackstone); or the principle of compensation, there being

(1) 2 Bligh (N. S.), p. 147. (2) 5 Bing., p. 162.

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a reciprocity of possible loss and possible gain; or public policy, it being the interest of the community that the new territory should be cultivated as soon as possible—a point emphasized by Best, C.J., in the opinion given to the Lords in *Yarborough's Case* (1). The difficulty is, What is the unit or measure of time for "gradual and imperceptible"? What is the base to which the addition is to be made, and what is to be the method of observation? Is the increase to be latent at the end of a week or of a month (*R.* v. *Yarborough*, (2)), or for longer periods?

Justinian and Bracton attempt no definition. According to them latent increment is where no one can perceive how much is added at any moment of time, which would, literally understood, apply to all increments save those caused by sudden convulsions or avulsions. Again, the original coast-line might be defined by statute, documents, or physical structures, such as a sea-wall; and modern methods of scientific measurement might enable the rate of progress to be computed and ascertained.

I think that "gradual and imperceptible" must be understood, according to our Common Law, as referring to the faculties of average humanity, and to the transactions of every-day life. The question is peculiarly one for a jury, and, indeed, the contrary has not been argued.

If the words "gradual" and "imperceptible" relate to the process or progress of alluvion, and not to the result after a substantial or defined space of time, and if the right is inherent in and an essential attribute of the property, resulting from natural law, in consequence of the local situation—an accessory to the principal estate of land—a right founded on justice, arising from the risks to which the land is exposed, and recommended by public policy—does the ascertainability of the original basal line exclude the right? We have to deal with public rights, not rights founded on contract as between landlord and tenant, where it might be a question whether an accretion outside the limits of the holding was to be dealt with as belonging to

(1) 2 Bligh (N. S.) 147; 5 Bing. 163. (2) 3 B. & C., p. 107.

the landlord or as attached to the holding in the same way as an encroachment would be: *Whitmore* v. *Humphries* (1); *Mercer* v. *Denne* (2). The question is rather one of physical process than of the nature of the title to the principal hereditament.

Lord Yarborough's Case (3) appears decisive, for there the accretion was outside sea-walls. Not only did the plea omit to negative that there had been certain boundaries (which, on the present Crown argument, would have been necessary), but it averred that the accretion was outside and at the extremity of the demesne lands. In *Attorney-General* v. *Chambers* (4), Lord Chelmsford, however, indicates an opinion that, where the original marks and measures are known, there could be no accretion on the ground that though the progress might be imperceptible from day to day or from week to week, if, ultimately, a substantial space lay between the old and the new line, such an area could not be considered as added to the original hereditaments. He failed to observe that in substituting "result" for "progress," he was contradicting the fundamental proposition in *Lord Yarborough's Case* (3), which he was unaware, apparently, had been affirmed by the House of Lords, adopting the unanimous opinion of the Judges read by Best, C.J. The decision in 3 B. & C. was alone referred to by the counsel, and the Chancellor thought he was at liberty to treat the opinion of the King's Bench judges as not binding on him. His criticism of the applicability of the maxim *de minimis* exhibits the same error, and in quoting with approval the passage from the judgment of Alderson, B., in the *Hull and Selby Railway Case* (5), he overlooks the word "progress," the cardinal term in the sentence. In the *Hull Case* (5) it would seem that the original coast-line was ascertainable, or, at least, that the then coast-line had moved a considerable distance inland. It would have been plainly impossible to affirm that the coast-line had remained always the same. A conclusive presumption that it had never been altered would have been a

(1) L. R. 7 C. P., p. 1.
(2) [1905] 2 Ch., 538.
(3) 3 B. & C., p. 91; 2 Bligh (N. S.), p. 147; 5 Bing. 163; 1 Dow. & Cl. 178.
(4) 4 De G. & J., p. 55.
(5) 5 M. & W., p. 327.

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legal fiction wholly opposed to truth and fact. The judgment of Lindley, J., in *Foster* v. *Wright* (1) is to the same effect. In *Hindson* v. *Ashby* (2), Lindley, L.J., however, treats the question as still uncovered by direct authority.

The last case on alluvion is *Mercer* v. *Denne* (3). There the coast-line, in 1904, was the same as it had been in 1795, but, in the interval—in 1849—it had been different [(1904] 2 Ch., p. 555), a curious instance of fluctuating boundary and movable freehold. The judgments of Farwell, J., [1904] 2 Ch., at p. 558, and of Vaughan Williams, L.J., [1905] 2 Ch., at p. 579, are instructive. I do not discuss *Attorney-General* v. *Reeve* (4), as the *ratio decidendi* was, that the increase was not gradual and insensible.

In some districts the sea has receded, leaving places (for example, Sandwich), once ports, now far removed from the water; elsewhere the mainland, as at Shankill and Wicklow, has been eroded and washed away. In both classes of case the original boundaries can be fixed. There is no distinction between gradual and imperceptible addition and gradual and imperceptible subtraction. Whether the original boundaries of the lands were fixed by natural objects, or by constructions, such as sea-walls, Martello towers, &c., or by measurements and maps, or by the testimony of faithworthy old witnesses, the principle governing the ownership of alluvion growing by imperceptible process of nature is the same. The Ordnance Survey, in determining boundaries, can hardly be supposed to have had the effect of depriving the subject of alluvial rights as against the Crown.

In Roman law, the accretions outside a measured allotment, not belonging to that allotment, could have been appropriated apparently by the first occupier. In our law, each insensible addition attaches to the principal land, and though in result, the aggregate of additions may show a substantial enlargement of the original territory, this cannot displace retrospectively the

(1) 4 C. P. D., p. 438.
(2) [1896] 2 Ch., p. 1.
(3) [1904] 2 Ch., p. 534; [1905] 2 Ch., p. 538, C. A.
(4) 1 T. L. R., p. 675.

ownership of the previous minute accruing accretions. The opinion of Best, C.J., in 2 Bligh N.S., bases this common law principle on public policy and the necessity of occupation and improvement.

Dicta in old writers and cases in favour of a high prerogative view and passages in the treatise bearing Hale's name, apparently restrictive of alluvial ownership, are of no weight against *Lord Yarborough's Case* (1), which must be accepted as correct exposition of the common law. That the principle operates for or against the Crown as well as for or against a private owner: see the *Hull and Selby Railway Case* (2); *Yarborough's Case* (1).

Assuming what I by no means decide, that a portion of the strip now in dispute was not included in the defendant's title-deeds, does that circumstance enable the Crown, as to that portion, to succeed? The onus rests on the Crown; the distinction of portions and dates of accretion is unascertainable; the process of accretion has been apparently continuous. With regard to accretion before the defendant's conveyances, it vested in the defendant's several predecessors. If it was not included in the several conveyances, the omission cannot operate as an abandonment in favour of the Crown. At most, it would amount to evidence by conduct; it could not be taken as a conclusive admission equal to an estoppel. The omitted portion (if any) has been since in the defendant's exclusive possession, so that the title of the first owners has been divested; and the continuous successful assertion of the defendant's title in numerous legal proceedings is of great collective force.

The application to the Board for a by-law to restrain the taking of gravel, &c., referred to in the first argument, was not pressed as a substantive or conclusive argument. The correspondence can only amount to evidence; it could not divest vested rights in property or work an estoppel. Its weight is affected by many considerations. M'Carthy had been successfully asserting his title over the part in dispute; his object was to protect his

(1) 5 Bing. 163; 2 Bligh (N. S.) 147; 3 B. & C. 91; 1 Dow. & Cl. 178.

(2) 5 M. & W., p. 327.

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rights; the area was uncertain. I doubt if the 14th section of the Harbours Act, 1814, c. 159, applied to the place at all. If it did, it might possibly have been enforced in respect of shore belonging to M'Carthy by accretion, as well as over the foreshore proper (the *Musselburgh Case* (1)), so that, even if a by-law had been made, it would not have been incompatible with defendant's ownership. In any case, a mistake of law as to proprietary rights could not bind. It is hardly necessary to discuss the point, as the Solicitor-General bases his argument exclusively on the certainty of the original boundaries, and does not attack the findings otherwise, or ask for a new trial.

BOYD, J., concurred (2).

Solicitors for the Crown: *Hallowes & Hamilton.*
Solicitors for the defendant: *F. & C. Downing.*

C. N. K.

(1) [1905] A. C. 491.

(2) It may be of interest to note that precisely the same question arose fifteen years ago before Ross, J., in *Hickson's Estate* with reference to the gradual and imperceptible recession of the sea at a part of Brandon Bay, Co. Kerry, and was decided by him in the same way. An objection was filed by the Board of Trade claiming the foreshore up to the old high water mark. The case was argued by *C. E. Macdermot* for the objectors, and *W. Green* for the owners. *Yarborough's Case*; *Foster* v. *Wright* (cited by the learned Judge), and the passages from Hale, De Jure Maris, and Justinian above mentioned were referred to. On the 17th June, 1896, Ross, J., gave judgment overruling the objection. The solicitors in the case were: for the Board of Trade, *Hallowes and Hamilton*; for the owners, *M. G. Foley*. The case was of importance to the estate, as the tenants exercised rights over the foreshore, and made the protection of these a condition to agreeing for the purchase of their holdings. [ED.]

IN RE WORKMEN'S COMPENSATION ACT, 1906; CATHERINE WRIGHT, WIDOW, APPLICANT; SIMON KERRIGAN (TRADING AS H. J. O'NEILL), RESPONDENT (1).

Appeal. 1911. Feb. 15, 16.

Workmen's Compensation Act, 1906—*Accident arising out of, and in the course of, employment—Evidence—Hearsay—Statements made by deceased as to injuries—Return from work bearing physical marks consistent with alleged accident.*

A workman in the employment of an undertaker and funeral contractor had in the course of his ordinary duty to lift coffins in and out of vans. One morning he went out to his work without any marks of physical injury, and he returned suffering from hurts to his chest, side, and leg, the marks of which were visible, and seen by his wife and medical attendant. They were caused by abrasions as if something had knocked against him. He told the doctor that they were the result of an accident, and the doctor stated to the employer that the injured man said that he met with an accident by the moving of a coffin, that he was very bad, and would probably die of his injuries. The employer's reply (according to the doctor's evidence) was merely that he was insured. The injured man died of pneumonia, supervening on traumatic pleurisy caused by these hurts, and the Recorder of Dublin having so found, and also found that the accident arose out of, and in the course of, the employment:—

Held, by the Court of Appeal, that the statements of the deceased workman were properly admitted in evidence; and, following *Mitchell* v. *Glamorgan Coal Co.* (23 Times L. R. 588), that there was sufficient evidence to justify the findings of the Recorder.

APPEAL by the employer, Simon Kerrigan, trading as H. J. O'Neill, Funeral Contractor, from the award of the Hon. The Recorder of Dublin, dated the 11th January, 1911, granting to the applicant, as sole dependant, £150 compensation for the death of her husband, William Wright, deceased.

William Wright was in the employment of the respondent,

(1) Before the LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

WRIGHT v. KERRIGAN.

Kerrigan, on the 24th November, 1909, the date of the alleged accident. A letter dated the 1st December, 1909, which shortly shows the nature of the claim, was written by Mr. Moran, his solicitor, to the respondent as follows:—

"Dear Sir,—I am instructed by Mr. William Wright to apply to you with reference to injuries sustained in his employment with you on Wednesday last, the 24th ulto.

"He was getting a heavy coffin into a van when it slipped backwards and struck him in the chest and stomach. After a little while he continued working and continued to work on Friday and part of Saturday, though he was feeling some pain. On Saturday the pain was so bad that he had to go to bed. A doctor was called in on Monday, and it was found that he was in a very serious condition owing to some internal injury in the chest. He informed me that he has been in your employment for three years, and that his average earnings have been 22*s.* per week. I should be glad to know what course you intend to take in the matter, as the man's condition is most grave, and may possibly prove fatal,—Yours truly, W. A. MORAN."

Wright having died the next day, December 2nd, Mr. Moran wrote on behalf of his widow (the present applicant) on the 11th February, 1910, claiming £175 compensation for his death.

The respondent being insured no offer of compensation was made, and the application for arbitration was made on the 23rd June, 1910, stating as the nature of injury "Injury to the chest setting up inflammation caused pneumonia." On the 27th June, 1910, notice was delivered on behalf of the respondent, denying liability on the ground that the injury was not caused by accident arising out of or in the course of the deceased's employment.

The following evidence was given at the hearing as reported by the Recorder:—

Catherine Wright (the applicant)—"My husband, William Wright, assisted drivers at respondent's place; he lifted coffins out of vans. On Wednesday, the 24th November, he went to work. When he came home, he was complaining of leg hurt that day. There was a black mark on his chest, right side, and his leg was strained, swelled; and he was marked on the stomach.

On the next day, Thursday, and the following day, Friday, he went to work. On Saturday went to bed, very bad. Dr. Crinion saw him. There was an inquest."

Dr. Crinion—"I attended applicant's husband on Monday, the 29th November. I examined him and recommended him to go to hospital. He objected. I strapped his side where he complained of pain, which he said was the result of an accident. I prescribed for his leg, which he said was hurt. There was a mark on the right side as if something knocked against him, and also on his right leg. They were caused by abrasions of some sort. He died of pneumonia supervening on pleurisy. On the *post-mortem* there was pus found on the inside of the pleura in the region of injury, and this indicated that pleurisy followed on injury. I went to respondent and said I thought the man would die. He (the respondent) said he was insured against accidents. In my opinion, the pleurisy on which the pneumonia supervened was caused by injury, *i.e.*, traumatic, and the *post-mortem* showed that to be correct. I told him (Mr. Kerrigan) that the deceased said that he met with an accident by the moving of a coffin. I told him he (Wright) was very bad. The reply was that he (Mr. Kerrigan) was insured."

This closed the evidence for the applicant, and *Louis Kelly*, for the respondent, asked the Recorder to dismiss the claim, on the ground that there was no evidence to show that the death was caused by anything in the course of the employment. His Lordship declined to do so, and the following evidence was then given on behalf of the respondent.

Simon Kerrigan, the respondent—"Deceased was in my employment up to Saturday, the 27th November. I heard nothing of an accident. On that day he came to me. He said he felt bad with a heavy cold and was going to lie up for a few days. He was an aged man. He did not present symptoms of cold. I saw Dr. Crinion I think the following Tuesday. I had heard of no accident."

Cross-examined—"Dr. Crinion said the man was very bad, and had met with an accident. I said that was the first I heard of it. He asked me was I insured? I said 'yes.' I notified the Insurance Co., and they are fighting the case."

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Peter Rock—"I am employed by the respondent. Deceased was a helper. I am a hearse-driver. I take coffins from a loft if I am there. I cannot recollect if a coffin went out on the 24th. I had nothing to do with it. I saw deceased every day for months complaining of pain in the chest and coughing. He was seventy years of age. The deceased was not able to do anything. He was lying in the house in the yard for weeks before it. He might have complained, but not to me."

To the Recorder—"The day after he left his work I heard he said he met with an accident."

Cross-examined—"I heard that he met with an accident in putting the coffin into the van. I heard this the day after he left employment. I heard the talk of it in the yard."

Matthew Connolly—"I am in the employment of the respondent. I remember the last week the deceased worked. I did not pass much remarks on his health up to the day (Saturday) that he went home. The deceased told me he was very ill. I told him to tell Mr. Kerrigan. He said nothing to me of an accident. I first heard of the accident after his death."

Peter Hynes—"I am a coffin-maker. I knew the deceased. I remember the last week the deceased worked. I observed his condition. He was complaining of pains in his sides. In the last week he was shivering with cold. He had a cough. He did not complain of accident."

Cross-examined—"I know it is said there was an accident."

Thomas Roche—"I knew deceased. I remember the 24th November. One coffin went out that day. I assisted in the shifting. The deceased did not help me. He was not asked to cross the yard. He was complaining of shivering, and coughing. On Thursday he came back. After driving a brougham he had to be lifted off the brougham. I went home with deceased. He did not tell me of accident, and he had a heavy cold. I heard from sergeant of police (after the death) of the accident, who said the accident occurred in the yard."

Cross-examined—"I was not so clear at the inquest that only one coffin went out, but I am much clearer now. I heard Mr. Kerrigan stating at the inquest that no coffin went out that day at all. I say there did."

John Kavanagh—"I keep a forge. The deceased brought up a horse to be shod on Saturday, the 27th November. He came and tied the horse to a ring. I said, 'What is up with you?' He said, 'I am very bad.' He commenced to cough, and he said he had a shivering cold. I gave him the price of a glass of rum."

Dr. Foy—"I was not present at the *post-mortem*, but I examined the body afterwards. I found no external marks except on leg. Dr. Crinion called my attention to marks on right side. I am of opinion they were *post-mortem* marks. I heard evidence of pus on the inside of pleura. It is no evidence of traumation. It is found with all manner of pleurisies, including traumation. I saw no evidence of an accident."

Cross-examined—"There is presence of pus in all cases. Young or old getting an injury on the chest may get pleurisy. The man had old-standing bronchitis."

Dr. Crinion, re-called—"I saw marks of injury on the deceased's leg and side on Monday, 29th November, and I prescribed for them, and gave both lint and bandages for them. He had the marks on his body which he told me was an accident, and I told his employer of it. What I saw on his person was consistent with the accident he stated to me occurred."

F. FitzGibbon, for the claimant, referred to *Mitchell* v. *Glamorgan Coal Co.* (1).

The following is the Recorder's finding:—

"I find as fact accident occurred in employment; that death caused by traumatic pleurisy supervening thereon. Award £150, and direct it to be paid to applicant as sole dependant."

Ronan, K.C., and *Louis Kelly*, for the appellants:—

Statements by the deceased man as to the mode in which his injuries occurred were not properly admissible: *Gilbey* v. *Great Western Railway* (2). In that case the workman was a meat porter in the employment of the Railway Company. In carrying

(1) 23 Times L. R. 588. (2) 102 L. T. (N. S.), 202.

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a side of beef from the lift to a stall the meat slipped, and in trying to keep it on his shoulder he caused, as was alleged, an injury to his left lung, and from that lung-disease he undoubtedly died. There was no witness of the occurrence, but he stated to his wife that the injury was caused by the accident. The County Court Judge (Lumley Smith) admitted the evidence, and on appeal by the Company the Court, consisting of Cozens-Hardy, M.R., Fletcher Moulton, and Buckley, L.JJ., held that he was wrong. Cozens-Hardy, M.R., in giving judgment, said:—"Statements made by a workman to his wife of his sensations at the time, about the pain in the side or head, or what not—whether those statements were made by groans or by actions, or were merely verbal statements—would be admissible to prove the existence of those sensations. But to hold that those statements ought to go further and be admitted as evidence of the facts deposed to is, I think, open to doubt; such a contention is opposed to all authority." And his Lordship then said that there was nothing in par. 580 of Taylor on Evidence, which had been relied on by counsel for the applicant, to justify such a proposition. Where evidence has been improperly admitted in the Court below, even without objection, the Court of Appeal would be bound to disregard it, and to decide the case as if it were non-existent: *Jacker* v. *International Cable Co.* (1), cited in Wylie's Judicature Acts (ed. 1906), note to Order LVIII, Rule 11. Although there may be cases in which, notwithstanding the absence of any eye-witness, the County Court Judge may be able to draw a rational inference that the accident arose out of and in the course of the employment, there must be evidence before him to warrant such an inference: *Bender* v. *Owners of S.S. Zent* (2). Here there was none: *Gatton* v. *Limerick S.S. Co.* (3). The fact that the injury results in death and prevents the workman's own evidence from being available does not alter the *onus probandi*: per Cherry, L.J., *ibid*, 575. [Counsel also cited *Marshall* v. *Owners of S.S. Wild Rose* (4), and *Gilbert* v. *Owners of Steam Trawler Nizam* (5)]. *Mitchell* v. *Glamorgan Coal Co.* (6) is

(1) 5 Times L. R. 13.
(2) [1909] 2 K. B. 41.
(3) [1910] 2 I. R. 561.
(4) [1910] A. C. 486.
(5) [1910] 2 K. B. 555.
(6) 23 Times L. R. 588.

distinguishable. There were in that case reasonable grounds for inferring that the workman's finger was crushed during the work. Here if you eliminate the illegal evidence, there is nothing upon which to base the award of compensation.

F. FitzGibbon, for the applicant :—

The evidence admitted by the Recorder is of a class within the well-known exceptions to the general inadmissibility of hearsay evidence. The statements of the deceased man as to his bodily condition were in fact original evidence, whether made to his medical attendant or his wife, although perhaps more weight would be attached to the former: Taylor on Evidence, par. 518.

The Recorder was the tribunal to decide whether or not he believed them to be true. He accepted their truth and his decision on the point cannot be challenged here. As to the admissibility and effect of Dr. Crinion's statement to the respondent Kerrigan see Phillipps on Evidence, vol. i., p. 334, *et seq.*

This is a much stronger case than *Mitchell* v. *Glamorgan Coal Co.* (1). There all that the County Court Judge had before him was, that the workman went out to his work uninjured and returned maimed. Here, in addition to the evidence of Mrs. Wright and the doctor, we have the statement of Peter Rock, a witness in the employment of the respondent, and examined on his behalf, that the accident was the talk of the yard: *Rice* v. *Owners of "The Swansea Vale"* (2).

THE LORD CHANCELLOR :— Feb. 16.

This is almost a line ball case; but we are all of opinion that there was sufficient evidence on which the Recorder could act, and come to the conclusion of fact at which he arrived—that the death of the applicant's husband was the result of injuries, caused by an accident which arose out of, and in the course of, his employment.

I rest my opinion chiefly upon *Mitchell* v. *The Glamorgan Coal Co.* (1). The deceased workman's employment was lifting

(1) 23 Times L. R. 588. (2) 3 Butterworth, 152.

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coffins out of vans, and while he was so engaged, one of them might easily have struck his chest and caused the abrasion to which his wife, the applicant, deposes. She says, "On the 24th November, he went to work. When he came home, he complained of leg hurt that day. There was a black mark on his chest, right side, and his leg was strained and swelled, and he was marked on the stomach."

Dr. Crinion attended him on the 29th November. He says, "I strapped his side where he complained of pain, which he said was the result of accident," which it evidently was, "I prescribed for his leg, which he said was hurt. There was a mark on the right side as if something knocked against him, and also on his right leg. They were caused by abrasions of some sort."

Then he gives the cause of death. "He died of pneumonia supervening on pleurisy. On the *post-mortem* there was pus on the inside of the pleura in the region of injury, and this indicated that pleurisy followed on injury. I went to respondent" (Mr. Kerrigan), "and said I thought the man would die, and he said he was insured against accidents. In my opinion, the pleurisy on which the pneumonia supervened was caused by injury, *i.e.* traumatic; and the *post-mortem* showed that to be correct."

He then added: "I told him" (Mr. Kerrigan) "that deceased said that he met with an accident by the moving of a coffin. I told him he was very bad, and the reply was that he" (Mr. Kerrigan) "was insured."

I do not attach much importance to this as an admission. Kerrigan was not personally concerned; he was covered by his policy of insurance. I do not think that there is much in that part of the case.

Roche, who was employed by the respondent, and was examined as a witness on his behalf, proves that only one coffin went out on that day (24th November). His evidence is, "I assisted in the shifting. The deceased did not help me. He was not asked to cross the yard. He was complaining of shivering, and coughing . . . I went home with deceased. He did not tell me of accident, and he had a heavy cold."

On cross-examination this witness said, "I was not so clear at the inquest that only one coffin went out, but I am much

clearer now. I heard Mr. Kerrigan stating at the inquest that no coffin went out that day at all. I say there did."

We have, therefore, the fact that one coffin went out of the respondent's premises on that day, and I think, from the evidence of Dr. Crinion, that it is more consistent with the injury to hold that it was caused by that coffin. Dr. Crinion was recalled and deposed: "I saw marks of injury on deceased's leg and side on Monday, 29th November, and I prescribed for them, and gave both lint and bandages for them. He had the marks on his body, which he told me was an accident, and I told his employer of it. What I saw on his person was consistent with the accident he stated to me occurred."

What does all that lead up to? That this man, employed in lifting coffins out of vans, went out well and returned home the evening of the same day bearing marks which are consistent with a coffin having struck against him.

Under these circumstances the *Glamorgan Case* (1) applies. The man comes home with marks which are consistent with the injury having occurred in the course of his employment. In the *Glamorgan Case* (1) the Court came to the conclusion that the County Court Judge might have drawn the inference that the injury arose in the course of the work. The Recorder has come to that conclusion in the present case, and I do not think we would be justified in setting aside his order.

HOLMES, L.J.:—

The question for our consideration is one that frequently arises, namely, whether the County Court Judge had evidence before him that a deceased workman's death was caused by an accident arising out of or in the course of his employment. As regards certain matters there is in this case clear evidence. When the doctor went to see him, there were marks on his body which could have been caused by a heavy coffin striking against it. There is strong evidence that death resulted from the injuries that caused these marks.

(1) 23 Times L. R. 588.

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Holmes, L J.

Assuming that these personal injuries were the cause of death, is there evidence that the injuries occurred by an accident arising out of and in the course of his employment? Though very short, I think it was sufficient to enable the Recorder to find as he did, The deceased man's employment was to assist the respondent's drivers in lifting coffins out of vans in the course of the respondent's business as an undertaker. On the particular day (the 24th November) when he went out to his work he had no physical injuries on his person. He came back, and his wife describes physical injuries, which she saw. He was at work that day; and I think, therefore, that under these circumstances the Recorder was justified in finding that the physical injuries arose in the course of his work.

CHERRY, L.J.:—

I concur. It is well settled that questions of fact under the Workmen's Compensation Act are entirely for the County Court Judge to decide, and that this Court can only interfere with his decision when it comes to the conclusion either that there was no evidence on which he could properly act in finding for the applicant, or that he has made some error in point of law.

It is said that there was no evidence in this case to justify the Recorder in holding that the injuries to the deceased workman were caused by an accident arising out of and in the course of his employment. The learned Recorder is said to have acted upon hearsay evidence; but hearsay evidence is in some cases admissible, and the learned Recorder appears to me to have acted strictly in accordance with the settled rules of evidence. There is no better authority on this branch of the law than the Recorder himself. He ruled out statements as to the circumstances of the accident. He admitted the statements made by the deceased man to his medical attendant, Dr. Crinion, as to his symptoms and their cause. Such statements are usually held to be admissible upon the ground that there are no other means possible of proving bodily or mental feelings than by statements of the person who experiences them.

The decisions in workmen's compensation cases show, especially where death occurs, that very slender evidence may be sufficient to justify an inference that an injury has been caused by an accident in the course of the employment. There can be no better illustration of this than the case of *Mitchell* v. *Glamorgan Coal Co.* (1). Practically all that was proved there was that the man went out to his work uninjured, and that he came back with a crushed finger. But from that one fact the Court of Appeal held that the County Court Judge was at liberty to infer, first, that the injury was caused by an accident; secondly, that the accident arose in the course of the employment; and, thirdly, that it arose out of the employment.

Following that authority, I think the Recorder was quite justified in the conclusion of fact at which he arrived in the present case.

Solicitor for the applicant: *W. A. Moran.*
Solicitor for the respondent: *M. Good.*

W. G.

(1) 23 Times L. R. 588.

Appeal. 1911.

Feb. 15.

THE KING (HENDERSON) *v.* THE CHAIRMAN AND JUSTICES OF COUNTY LOUTH.

Licensing Act, 1902 (2 *Edw.* 7, *c.* 18), *section* 2, *sub-sect.* 1—"*Licence*"—"*Licensed premises*"—*Distributive construction*—*Wine and beer dealer's licence*—*Application for publican's licence.*

The exception in sub-section 1 of section 2 of 2 Edw. 7, c. 18, was intended to preserve existing interests, and is to be construed distributively. It does not entitle the holder of one kind of licence to obtain another of a different nature, *e.g.* the holder of a wine and beer dealer's licence to obtain a publican's licence.

The King (*Collins*) v. *The Chairman and Justices of County Donegal* ([1903] 2 I. R. 533) and *Rex* (*Dorrian*) v. *Greer* (3 New Irish Jurist, 302) approved of.

APPEAL by Patrick Matthews from an order of the King's Bench Division, dated 13th January, 1911, disallowing the cause shown against a conditional order, dated 27th October, 1910, for a writ of *certiorari* to bring up for the purpose of being quashed an order made at the annual Licensing Quarter Sessions at Dundalk on the 4th October, 1910, granting the appellant a certificate enabling him to obtain a full publican's seven-day licence, and also the said certificate.

The conditional order was obtained on the affidavit of the prosecutor, Harold E. Henderson, District Inspector, Royal Irish Constabulary, which stated that he attended at the Annual Licensing Quarter Sessions, at which Patrick Matthews, the appellant, who was theretofore the holder of a six-day licence for the sale of beer and wine in respect of his premises, applied for an ordinary seven-day publican's licence, and that he, the District Inspector, opposed the granting of a certificate for such a licence, relying on *The King* (*Collins*) v. *The Chairman and Justices of the County of Donegal* (1) and *The King* (*Boyle*) v. *Justices of County Louth* (2). His Honor the County Court Judge and

(1) [1903] 2 I. R. 533. (2) Unreported.

Chairman was against granting the certificate, but was out-voted by the other Justices, and an order was made granting the certificate for an ordinary seven-day licence. The grounds on which the conditional order was made as stated therein were—first, that the said certificate was given, and order made, without and in excess of jurisdiction; secondly, that said premises were not licensed as seven-day licensed premises from January 1st, 1902, to 31st July, 1902; thirdly, that said certificate was given and order made contrary to the provisions of section 2 of 2 Edw. 7, c. 18.

The affidavit of the appellant filed as cause stated that for twenty years prior to the Sessions he held a six-day combined wine and beer dealer's licence for the sale of wine, ale, beer, and porter for consumption on the premises, and that, although his solicitor inadvertently served notice of application for an ordinary seven-day licence, he intended only to apply for a six-day licence to sell whiskey, wines, and malt drinks on the premises, and that his counsel so stated audibly in Court.

Notwithstanding this, however, the certificate granted was for the seven-day publican's licence.

Healy, K.C., for the appellant:—

The question raised here is, whether a person who holds a licence for certain premises can, under the Licensing Act of 1902, obtain a licence of a different kind in respect of the same premises. It is true that the King's Bench Division decided this question in the negative shortly after the passing of the Act, but that decision is not binding on this Court, and the provisions of the recent Finance Act make it important for the trade that that decision, which is contended to be erroneous, should be reviewed. Nothing can be wider than the actual words of the exception in the first sub-section of section 2 (1). The words used are "licence for the sale of intoxicating

(1) 2 Edw. 7, c. 18, s. 2. From and after the passing of this Act, no licence shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except—(1) For premises which are now licensed or which were licensed at any time since the 1st January, 1902.

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liquors" and "licensed." The definition of licence (1) is quite different from that in the Act of 1874 (37 & 38 Vict. c. 69), sect. 37. In the Act of 1902, the word "licence" has a meaning which was attached to it in no other Act. It includes an "on" and "off" licence which had previously been dealt with separately. Surely, in section 4, "licence" may include any kind of licence; and when the "growth" of a city or town justifies, a licence under it might be granted different in kind from the pre-existing licence.

The Solicitor-General (*Charles A. O'Connor, K.C.*) and *M'Sweeny*, for the prosecutor:—

In construing the Act of 1902, regard must be had to its purpose, which was to reduce the number of publichouses. The object of the exception in section 2, sub-section 1, was to enable the existing business to be carried on. In *The King* (*Collins*) v. *Justices of Donegal* (2), Madden, J., says, p. 539, "In the absence of express words, I could not come to the conclusion that a section obviously intended to preserve existing interests had the effect of altering them. If we were to disregard the distributive construction of the Act, the absurd result would follow that the holder of a beer-house licence would under this prohibitive legislation find himself in a position to apply for a publican's licence by virtue of a clause obviously intended to preserve existing licences, his particular interest being that of the holder of a licence of a different kind." And as Gibson, J., puts it (p. 537), "If an 'on' licence can be given to replace an 'off' licence, the statute becomes a kind of spirit grocers' Relief Act."

Collins's Case (2) was followed by a Court consisting of three

(1) Section 8. In this Act the expression "licence" means any licence for the sale of intoxicating liquor granted by an officer of excise other than a wholesale beer dealer's licence, or a licence required for a military or constabulary canteen, or a licence which can be granted without the production of a certificate of a Recorder or Justice.

(2) [1903] 2 I. R. 533.

other Judges in *Rex* (*Dorrian*) v. *Greer* (1), in which Palles, C.B., who delivered the judgment of the Court, stated that he would have come to the same conclusion even if *Collins's Case* (2) had not been decided. There is therefore the unanimous decision of six Judges of the King's Bench Division in favour of the construction of the statute for which we are contending.

Reference to other sections of the Act shows plainly that what the Legislature was contemplating in the exceptional cases in which the grant of a new licence was to be permissible was, that it should be of the same character as the old one. Take, for example, section 3, where provision is made for the expiration of a lease: surely the new licence to be granted in respect of premises in the immediate vicinity must be of the same character as that which became extinguished. How could it be reasonably argued that because his lease expires a spirit grocer is to get as a matter of course a publican's licence for other premises, though it is intelligible that it was intended to enable him to carry on his trade? So, in section 4, the word "substitution" implies similarity in kind; and in section 6 it is plain that the licence for extended premises was to be of the same class as that previously held.

Healy, K.C., in reply:—

I admit that where licensed premises are enlarged, the licence to be granted under section 6 of the Act of 1902 must be the same kind of licence as that previously held with the original premises. But that is a very special provision, and does not affect the present case.

(1) 3 New Irish Jurist, 302. (2) [1903] 2 I. R. 533.

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THE LORD CHANCELLOR :—

This case has been argued substantially as an appeal from the decision of the King's Bench Division in *The King* (*Collins*) v. *The Chairman and Justices of County Donegal* (1), which was, of course, followed in the same Court in the present case. We have the judgments before us, not only of the three Judges who decided that case, but also of the three Judges, including the Lord Chief Baron, in the case of *R.* (*Dorrian*) v. *Greer* (2), applying the principle so established, and the Lord Chief Baron says that he would have arrived at the same conclusion upon independent reasoning apart from the authority of *Collins's Case* (1). Therefore six Judges have taken the same view of the effect of this Act of Parliament, 2 Edw. 7, c. 18, s. 2, which I think is th e only reasonable construction of it that could be adopted. I cannot understand how it can be contended that a spirit grocer can under this legislation, which prohibits the grant of new licences except in cases falling within the exceptions in section 2, insist as a matter of course on a right to get a publican's licence.

We have no reason to differ from the judgment of the King's Bench Division, which must be affirmed.

HOLMES, L.J. :—

I know nothing about the history of this Act of Parliament (2 Edw. 7, c. 18), except what I find in the statute itself. It never would occur to me that the decision of the King's Bench Division as to its construction arrived at on two different occasions was erroneous. The reasons given by the Judges of the King's Bench Division are those which I myself would give for arriving at the same conclusion.

CHERRY, L.J. :—

I concur. In my view of the statute (3), taken as a whole, section 2 was merely intended to preserve existing interests, and to maintain the *status quo*, not to confer upon licensed

(1) [1903] 2 I. R. 533. (2) 3 New Irish Jurist, 302.
(3) 2 Edw. 7, c. 18.

traders a right to obtain a licence different in kind from what they possessed at the passing of the Act. I concur with the view of Gibson, J., in *Collins's Case* (1) that there are two possible interpretations of the section—one being that contended for by Mr. Healy in the present case. But when there are two possible constructions of a section, it is always permissible to refer to the other parts of the Act in order to see which is the correct one.

You must be guided in construing a doubtful clause by the intention of the Act as a whole; and when the other sections of this Act, particularly section 6, are read in connexion with section 2, it is perfectly clear that the view taken by the King's Bench Division was right. The word "licensed" must be read distributively, and the rule of construction *reddendo singula singulis* applied. The jurisdiction to grant new licences conferred by section 2 (1) and section 6 must, in my opinion, be held to apply only to new licences of the same character in all respects as those previously held, whether any such new licence is to be granted in respect of the same or adjoining premises to which it is proposed to extend the business.

Solicitor for the appellant: *M. C. Moynagh.*
Solicitor for the prosecutor: *Malachy Kelly.*

W. G.

(1) [1903] 2 I. R. 536.

Appeal. 1910.

Nov. 15, 16. Dec. 2.

JACKSON, Appellant; MAHON, Respondent. STEWART, Appellant; MAHON, Respondent (1).

Parliament—Registration of voters—Inhabitant householder—Occupation of portion of house—Subsequent occupation of entire house—Succession.

J.'s name appeared on the list of voters as "inhabitant householder" of part of a house; J. had during portion of the qualifying period in fact occupied part of the house, a sub-tenant of J.'s occupying the remaining part; but on the determination of the sub-tenancy J. went into possession of and occupied the entire house during the remainder of the qualifying period.

Held, by Holmes and Cherry, L.JJ. (Lord O'Brien, L.C.J., dissenting), that the claimant was entitled to a vote, and that it was unnecessary that the qualifying premises should have been set out in the list of voters as a house in succession from part to the whole of the premises.

Appeal from the decision of Mr. T. Henry Maxwell, one of the Assistant Revising Barristers for the County Borough of Londonderry. The case stated was as follows:—

The name of Denis Jackson appeared on the Town Clerk's List (No. 17) for the West Division of the said County Borough as follows:—No. 784, Jackson, Denis, 50 William Street, inhabitant householder; part of 50 William Street. The said name was duly objected to. The voter was examined, and proved before me, and I found as a fact, that the voter occupied, during part of the qualifying period, part of the premises No. 50 William Street, during which time James Boyle, a sub-tenant of the voter, occupied the remaining portion of No. 50, William Street. During the currency of the qualifying period the said James Boyle's sub-tenancy ceased, and the voter went into occupation of the portion of the said premises theretofore occupied by Boyle, and continued in occupation of the entire of No. 50 William Street for the remainder of the qualifying period. The said James Boyle was admitted as

(1) Before Lord O'Brien, L.C.J., and Lords Justices Holmes and Cherry.

a voter in respect of the said premises so occupied by him, with other premises in immediate succession thereto. There was no evidence that the omission of the entire premises was due to mistake. Mr. Tracy, for the voter, contended that it was not necessary that the succession to the whole house should be stated in the said list; and that, if it was, I had power to amend the said list. He relied on *M'Daid* v. *Heany* (1) and *Higgins* v. *Holland* (2). Mr. Caldwell, for the objector, argued contra, and relied on *Kilbarry* v. *Mahon* (3). I held that it was necessary that the entire house, No. 50 William Street, should have been set forth in the column headed "name and description of premises rated," in immediate succession to part of No. 50 William Street, that *Kilbarry* v. *Mahon* (3) applied, and that I had no power to amend the said list by supplying the said omission. I accordingly expunged the voter's name. Had I had power to make the necessary amendment, I should have done so. The questions for the Court of Appeal are:—(1) Whether the qualifying premises should have been set out in the said list as a house in succession from part of to the whole of the said premises? (2) Whether I had power to make said amendment? If I was wrong in holding that it was necessary that the entire house, No. 50 William Street, should have been set out in the column headed "name or description of premises rated," in immediate succession to part of No. 50 William Street, or if I had power to amend, the name of the said voter is to be restored, and the register amended in the manner hereinbefore mentioned, or as the Court of Appeal shall direct.

The facts in *Stewart, Appellant*; *Mahon, Respondent*, were similar.

A. M. Sullivan, K.C., and *J. J. Dougherty*, for the appellant:—

This case is ruled by *M'Daid* v. *Heany* (1) and *Higgins* v. *Holland* (2). The fact that after the determination of Boyle's sub-tenancy the claimant was in possession of the entire premises does not affect his right to a vote in respect of the portion.

(1) 2 Lawson, 128.
(2) *Ibid.*, 207.
(3) 3 Lawson, 363.

Appeal. 1910. JACKSON v. MAHON.

Henry, K.C., and *Osborne*, for the respondent :—

The finding of the Revising Barrister that James Boyle, "a sub-tenant of the voter," occupied the remaining portion of the premises distinguishes this case from *Higgins* v. *Holland* (1); that finding implies that up to the departure of Boyle there were two dwellings, one of which was occupied by the claimant, and after Boyle's departure the claimant was in occupation of a different dwelling, namely, the entire, and accordingly a succession claim was required: *Ladd* v. *O'Toole* (2).

Dec. 2.

LORD O'BRIEN, L.C.J. :—

[The Lord Chief Justice, after stating that the facts of the present case differed from those of any other case, read the entire of the case stated by the Revising Barrister, and continued as follows] :—

I wish to emphasize the fact that the claim was for *part* of a house, and the circumstance that the claimant and Boyle had, till Boyle left, separately occupied and inhabited, during one portion of the qualifying period, different parts of one physical structure, viz., one house. The present case seems to me to give rise to the following questions :—Is part of a house a whole house? Is a whole house part of a house? Is part of a house, though another part of it was occupied separately during portion of the qualifying period, and was a distinct subject-matter of the franchise, a whole house? When there were two "dwellings" within the qualifying period can they be regarded as one "dwelling" within the qualifying period? I wish to emphasize the word "dwelling," which I use in contradistinction to the word "house," the latter signifying one entire physical structure under one roof. What is the claim here? It is a claim in respect of *part* of a house; this fact must never be lost sight of. To establish a claim in respect of *part* of a house, the *part* must be occupied separately, that is to say, the *part*, and the measure of its inhabitancy and occupation must be substantially identical; and this was the case before Boyle, the sub-tenant, left the house.

(1) 2 Lawson, 207. (2) [1904] 2 I. R. 389.

During his occupancy as sub-tenant there were two separate parts of the house in respect of each of which there were different persons respectively entitled to enjoy, and who did enjoy, the franchise. There were two "dwellings" in the same general structure. Lord Justice FitzGibbon rightly said in *Sharkey* v. *Holland* (1), that it was clear from the definition of "dwelling-house" there may be two or more "dwellings" under the same roof. The Revising Barrister held, in the present case, that when Boyle went away, and when Jackson came into occupation of the whole house, the latter had a subject-matter of franchise different from what he had before that; that separate occupation of a part as a dwelling ceased, and exclusive occupation of the whole as a dwelling accrued, and that there should be, accordingly, a succession claim. The whole, though including a part, is a different entity from a part; and, conversely, a part, though included in a whole, is a different entity from a whole.

The fact that the franchise was claimed in respect of the occupation of a *part* shows that what remained of the building was a distinctive thing from the part in respect of which the claim was made. I think it was for the Revising Barrister to determine as a matter of fact whether a part of a house, under all the circumstances of this particular case, could be regarded as a whole house; whether the balance which remained over and above a part was so unsubstantial that the original part did not lose its identity.

I think he did determine that the part occupied by Boyle was such a substantial part of the house that the other part originally occupied by the voter lost its identity and became, so to speak, merged in the whole of the house. One house, one physical structure called a house, may be one dwelling, or may comprise two or more dwellings. This depends upon all the circumstances of each particular case; whether all was occupied and inhabited as one dwelling, or whether a part or parts was or were occupied as separate and distinct dwellings. It is for the Revising Barrister to determine this on the evidence: see *M'Daid* v. *Heany* (2); and *Toye's Case* (3), and upon the evidence in this particular case the

(1) 2 Lawson, p. 126. (2) 2 Lawson, p. 128.
(3) 2 Lawson, p. 122.

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Revising Barrister, exercising his legitimate function, came to the conclusion that for a certain time, that is to say, during Boyle's tenancy, Jackson occupied and inhabited only part of the house as his dwelling, namely, the part which Boyle did not occupy and inhabit; and he decided that when Boyle left, Jackson occupied and inhabited the whole physical structure as his dwelling-house; that is to say, that during the qualifying period he occupied different dwellings; or, in other words, that there was a succession from a part to the whole. Surely, if there was evidence to support the finding, we cannot disturb it; and most certainly the dwelling which comprised part of a house only is a different dwelling from that which comprised the whole of the house. During Boyle's tenancy Jackson did not, and, indeed, could not, actually or constructively inhabit or occupy the premises comprised in his tenancy. This is all for the Revising Barrister; and if there be evidence to sustain his view, we cannot reverse him. I think I should be justified in saying no more; I might stop here, resting my decision on the facts of this particular case, for they are different from those of any other. But perhaps I might refer to *Toye's Case, Toye* v. *Holland* (1). In that case there was a question of different dwellings in the same physical structure; it was a case of the occupation of different rooms in one house.

The head-note correctly states the facts and the decision. It is as follows:—"A tenant of a house inhabited certain rooms in it during part of the qualifying period; then sub-let some of these rooms to another person, and inhabited the remaining rooms during the rest of the qualifying period; he was returned on the Town Clerk's list as an inhabitant occupier of the whole house. The Revising Barrister held that he should have made a succession claim, stating the different rooms which he inhabited during the qualifying period, and struck out his name. The Court of Appeal affirmed the decision of the Revising Barrister *as a decision on a question of fact only.*" This is the head-note. Now I shall

(1) 2 Lawson, p. 122.

read the judgment of Lord Justice Fitz Gibbon, who gave the first judgment in the case. It is as follows:—

"The answer of the Revising Barrister appears to show that there is a real distinction between the two cases; that is, between this case and *Sharkey* v. *Holland* (1), on a question of fact, namely, whether the identity of the house was so far altered as to make it reasonable for the Revising Barrister to find that it was a different house. We all think that the principle of a succession claim is this—*that it is necessary when the premises are different dwellings to have a succession claim.* The findings appear to show that the premises occupied at different periods were really different dwellings. *The question resolves itself into a question of fact.* The law is clear that there must be a succession claim, if the premises are different dwellings. The facts are different in the two cases, though the *ratio decidendi* may be the same. *We are not finding a fact*; but, having regard to the statement of fact, there is evidence to sustain the finding that the dwelling-houses were so far different throughout the year as to require to be stated. *We must affirm the finding as being capable of being supported by the evidence stated in the case.*"

The Lord Chief Baron, to whose judgment I also refer, concurred in this judgment, as did Lord Justice Walker, Lord Justice Barry, and myself.

I think the principle of this decision is applicable to the present case, and is entirely satisfactory. I might refer also to *Sharkey* v. *Holland* (1). There the Court held that the claimant was entitled to the franchise, as there was no evidence that he occupied throughout the whole of the qualifying period any but a part of the house. In this fact lay the distinction between that case and *Toye's Case* (2). There was a difference in fact between the two cases, but the principle of decision was the same. Here it cannot be denied that the extent of the occupation and the dwellings were different during the qualifying period. So, at least, found the Revising Barrister, and there was, in my opinion, ample evidence to justify the finding.

(1) 2 Lawson, p. 126. (2) 2 Lawson, p. 122.

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Kilbarry's Case (1) has been referred to. No doubt the point decided in that case was that a claim cannot be amended by the addition of new premises; but what, under the circumstances of this particular case, would be the effect? I emphasize the word "effect." It would be this—to get rid of the decision in *Kilbarry's Case* (1) by making "part of the house" include the whole house. This would be not merely the identification of a part, but would, in effect, be adding new premises in a very wholesale way. It would in effect be, so far at least as related to a substantial part of the qualifying period, metamorphosing a claim for a part into a claim for the whole, and it would be metamorphosing a part of a house into a whole house.

My view of this case does not at all apply where the change may be of an unsubstantial character. A dwelling-house does not lose its identity through some unsubstantial expansion or shrinkage in structure. If what is added or taken away be, say, a wareroom, a bath-room, a smoking-room, a billiard-room, or a ball-room, it would be idle to contend that in such a case a succession would be necessary. The house would not in such a case lose its identity: *de minimis non curat lex.* But here the circumstances are wholly different. *Higgins' Case* (2) and *Gorman* v. *Holland* (3) have been much relied upon by the appellant. No doubt I was myself a party to the decisions in those cases, and must accept my share of the responsibility for them; but I find that I said in *Gorman* v. *Holland* (3) that I feared we were departing from previous decisions, but that I would not press my doubts so far as to dissent; but I think that the facts in this case are different from those of any antecedent one. The facts as regards Boyle's separate occupancy and inhabitancy, and the finding of the Revising Barrister with reference to that occupancy and inhabitancy, are differentiating factors. But if I were to choose between different decisions, I would select *Toye's Case* (4) as laying down the correct procedure and the correct principle of the decision.

(1) 3 Lawson, p. 363.
(2) 2 Lawson, p. 207.
(3) 2 Lawson, p. 213.
(4) *Ibid.*, p. 122.

The case of *Allen* v. *Fegan* (1), decided by us at this sittings, has, in my opinion, no bearing on this case. In that case there was a question whether a claimant did occupy and inhabit a house in a place called Banbrook Hill, or whether he continued to occupy and inhabit a house in certain convent grounds. The houses were a considerable distance apart, and were both distinct structures. It was argued that the claimant did not inhabit the house at Banbrook Hill because, as was alleged, he still continued to occupy and inhabit as his dwelling the house in the convent grounds. We inquired as to this, and, in answer to our inquiry, the Revising Barrister informed us that before the claimant went to Banbrook Hill he had surrendered the house in the convent grounds. In that case there was no question as to the inhabitancy and occupation of a part being succeeded by an inhabitancy and occupation of a whole of the same physical structure, the same house. The mere statement of the facts seems to me to show that the case of *Allen* v. *Fegan* (1) has no bearing on the present case. The question there was, which of two separate and wholly distinct and different structures the claimant occupied at a given time.

I am also anxious to point out that my view in this case does not at all restrict or curtail the franchise. The question at issue is substantially a matter of procedure, whether, under all the circumstances, a succession claim should be filed. The Revising Barrister thought a succession claim should have been made, and so do I. I think the Revising Barrister was right.

But before I conclude, let me put this question. Suppose next year the facts were identical, would a claim in respect of the *part*, and a succession claim in respect of the whole, be good or bad? In my opinion it would be clearly good. Let me put another case. Take a house, one entire physical structure, with twelve rooms; suppose for six months of the qualifying period the voter occupied and inhabited as his dwelling two of the twelve rooms, and, on the expiration of the first six months, went into occupation of the remainder of the house, that is to say, the remaining ten rooms; and for the remainder of the qualifying

(1) Unreported.

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period occupied and inhabited the whole of the house as his dwelling, would it be possible to regard the ten rooms as portion of the part, that is to say, portion of the two occupied during the first six months? This, in the eye of common sense and reason, would be impossible. Could it be said that, in that case, one claim for a part would be sufficient?

On the whole case I think the finding of the Revising Barrister should not be disturbed. I have gone into the matter at some length, as I think it involves a question of principle.

HOLMES, L.J.:—

The facts of these cases cannot be distinguished; and the point arising in each will be understood by a statement of the material circumstances of the first of them.

Jackson's name appeared in the Town Clerk's list as inhabitant householder of part of 50 William Street, and during the earlier portion of the qualifying period he occupied part of that house, James Boyle being his tenant of the rest of it. In the course of such period Boyle's tenancy ceased, and Jackson thereupon became the occupier of the whole house. The objection taken was that this circumstance made it necessary to have the succession to the whole house stated in the list, and that the omission to do so disqualified Jackson. The Revising Barrister held this objection to be good, and that he had no power to amend the list.

It has been held by this Court in *Kilbarry* v. *Mahon* (1) that if such an amendment is necessary there is no jurisdiction to make it; and, therefore, as we are bound by this decision, there only remains the first question submitted for our consideration: whether the qualifying premises should have been set out in the list as a house in succession from part to the whole of the premises. Jackson occupied part of the house sufficient to qualify him as a voter for the whole period; and his acquiring another part of it during the period did not in itself disqualify him. In this state of things, I should hold without hesitation, even if there were no authority on the point, that the statement of such acquisition was superfluous and unnecessary, and, therefore, that

(1) 3 Lawson, 363.

there was no need of amendment. The light of reason and common sense would have led me to this conclusion; but, recognizing the great importance of uniformity of decision in these registration cases, I look anxiously for guidance to our previous judgments. In the present instance I have not looked in vain.

In *Higgins* v. *Holland* (1) a man claimed for part of a house, specifying the number of the house, but not any particular room in it. He had during the whole of the qualifying period been in occupation of three rooms, the remaining three being then let to his father, whose tenancy ceased during the period, when the son went into occupation of the whole house. The Revising Barrister found that the son occupied a different dwelling-house after his father left from that occupied by him before; and in the absence of a succession claim struck out the son's claim. This Court, following *Keenan* v. *Buchanan* (2), then unreported, held the decision appealed from wrong and restored the name.

This case cannot be distinguished from the present; and I follow it more gladly as it is in accordance with the view which I would have taken in the absence of authority.

The same principle was acted on in *M'Daid* v. *Heany* (3) and in *Gorman* v. *Holland* (4); and I think that we should never have heard of this question again, were it not for an erroneous view taken of our decision in *Kilbarry* v. *Mahon* (5). There the only question reserved was whether the Revising Barrister had power to amend by converting the claim into one by succession; and when Mr. Sullivan tried to argue that no amendment was necessary he was stopped by the Court, inasmuch as this was not reserved.

CHERRY, L.J.:—

In these two cases, the circumstances of which are identical, the voter occupied, at the commencement of the qualifying period, portion of a dwelling-house, which was, under the 5th section of the Parliamentary and Municipal Registration Act, 1878 (30 & 31 Vict. c. 26), in itself sufficient to entitle him to the franchise,

(1) 2 Lawson, p. 207.
(2) *Ibid.*, p. 211.
(3) *Ibid.*, p. 128.
(4) *Ibid.*, p. 213.
(5) 3 Lawson, p. 363.

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provided he continued in occupation for the whole period. He did so occupy for the whole period, and if there were no other circumstance in the case, would clearly be entitled to be registered as a voter. It has been ruled, however, by the Revising Barrister that inasmuch as he acquired during that period the occupation of another portion of the house, which previously had been sublet, he is thereby disqualified from claiming in respect of that portion which he originally held. I cannot see how a man can lose his right to the franchise by reason of his acquiring additional premises to those in respect of which he makes his claim. If the first premises were sufficient in law, as they were, to give him the right to vote, how can the second deprive him of that right?

The Revising Barrister held that having gone into occupation of the whole house the qualifying premises should have been described as "the whole house in immediate succession to" the part previously occupied. To apply such a description would have been, in my opinion, wrong. A succession implies a change. The voter must give up his residence in one house and acquire a residence in another in order to be entitled to claim as a successive occupier. This was our decision recently in the case of *Allen* v. *Fegan* (1), where we held that such a claimant was bound to prove the surrender of his former residence before he could claim in succession to another; and we sent the case back to the Revising Barrister to ascertain whether or not there had been such a surrender.

Here there was no change. The voter continued to reside in the same house throughout. It is true that he had some additional rooms at the end of the qualifying period which he did not occupy at the beginning, but there was no *succession* in his occupancy.

I do not think that we can affirm the decision of the Revising Barrister in these cases without overruling the previous decisions of this Court in *Higgins* v. *Holland* (2); *Keenan* v. *Buchanan* (3); and *Gorman* v. *Holland* (4). The latter case was the converse of

(1) Unreported.
(2) 2 Lawson, p. 207.
(3) *Ibid.*, p. 211.
(4) *Ibid.*, p. 213.

the one now before us. There it was proved that the claimant gave up a room during the qualifying period, and it was held that he did not thereby forfeit his right to the franchise. That was a much stronger case for the objector than the present one, but it was clearly laid down by the Court that the expansion or shrinkage of a dwelling-house could not deprive the occupier of his vote. If it were not so, a man might lose the franchise by building a bath-room to his house, or by any other structural alteration.

It is said, however, that these cases do not apply where the claim arises in respect of a part of a dwelling-house only, inasmuch as the 5th section of 41 & 42 Vict. c. 26 only confers the franchise in such cases, "where that part is *separately occupied* as a dwelling." The argument implies that the Legislature intended the words "separately occupied" to mean an occupation of the part in respect of which the claim is made, to the exclusion of other parts of the same dwelling, and that if the voter, in each of these cases, was, at the end of the qualifying period, in occupation of the whole house, he could not be then said to "separately occupy" a part thereof. But I think that this is not the true reading of the section. The word "separately" was introduced, in my opinion, to describe the character of the occupation of the part occupied, not the exclusion of the remainder of the house. It means "not jointly" with any other person.

That this is the true meaning of the word "separately" in this context is made clear, I think, by the next clause of the section. "For the purpose," it runs, "of any of the Acts referred to in this section, where an occupier is entitled to the *sole and exclusive use* of any part of a house, that part shall not be deemed to be occupied *otherwise than separately* by reason only that the occupier is entitled to the *joint* use of some other part." The words "otherwise than separately" here obviously are equivalent to "jointly." From which it seems to follow that the word "separately" in the previous paragraph is equivalent to "otherwise than jointly."

There was no joint occupation at any time in the case of either of these voters, and therefore I hold that each of them "separately occupied" during the whole qualifying period the

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portion of the house of which he was in occupation at the commencement of the period. If I am correct in this conclusion, it follows that the decision of the Revising Barrister should be reversed and the name of the voter restored to the register in each case, and accordingly I concur in the judgment of Holmes, L.J.

Solicitor for the appellant: *John Tracey.*
Solicitor for the respondent: *C. S. Caldwell.*

R. ST. J. C.

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Old age pension—8 Edw. 7, c. 40—Statutory Regulations, Oct. 15, 1908, Rr. 18 (3), 19 (1)—Appeal from decision of local pension committee allowing pension—Notice of appeal—Second application for pension—Res judicata—Powers and duties of Local Government Board on appeal.

On an appeal to the Local Government Board by a pension officer from a decision of a local pension committee allowing a pension, it is sufficient that the claimant should have notice that an appeal has been brought; it is not necessary that notice should be given to him of the time and place of hearing. The Local Government Board have a discretion as to whether or not they shall hear in person the claimant and his witnesses. *Per* Madden, J. The claimant should be given an opportunity of presenting his case to the Local Government Board in some way suitable to the character of the inquiry, and it would probably be in writing.

The question of how far the principle of *res judicata* applies to applications under the Old Age Pension Act considered.

MOTION on behalf of John Cairns, on notice served by leave of the Court, on the Local Government Board for Ireland, for a conditional order for a writ of *certiorari* directed to the Board calling on them to show cause—

1. Why their order of the 29th September, 1910, made upon appeal from the Strabane and Donemana sub-committee of the local pension committee of the county Tyrone, purporting to determine that the said John Cairns is not entitled to an old age pension, should not be removed into this Court to be quashed on the grounds that same was made without and in excess of jurisdiction, in that no opportunity of being heard upon the said

(1) Before LORD O'BRIEN, L.C.J., and MADDEN and WRIGHT, JJ.

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appeal was afforded to the said John Cairns or anyone on his behalf, that the said appeal was determined in his absence and behind the back of the said John Cairns, and that the said order is bad on its face; and

2. Why a conditional order for a writ of mandamus should not issue against the Board, calling on them to hear and determine the said appeal according to law.

The application was grounded on the affidavit of the said John Cairns; and an affidavit of Alexander R. Barlas, Secretary of the Board, was filed on their behalf to oppose the motion. From these affidavits the following short statement of the material facts, which were not substantially in dispute, has been extracted.

On the 13th December, 1909, the said John Cairns applied for a pension, under the Old Age Pensions Act, 1908. The pension officer, on the 26th January, 1910, reported against the claim, on the ground that the claimant's means were over £31 10*s.*; and on the 3rd February, 1910, the sub-committee disallowed the claim on this ground. On the same day the claimant appealed to the Local Government Board on the ground as stated, "that my income is far below £31 10*s.*, as in the spring of 1908, my son got married and I made an arrangement to give him the half of the farm, and stock and crop, and he has a house built ready for occupation. The Government valuation is £4 5*s.* on land, £1 15*s.* on house, and the rent is £3, and my share of the stock is two cows, two calves and one horse, and one half of the crop as given to the excise officer, and I have no other means of support." On the 6th April, 1910, the Local Government Board decided that the claimant was not entitled to any pension, and this was communicated to the claimant by notice, dated 14th April, 1910.

On the 25th July, 1910, another application for a pension was made by the said John Cairns. The pension officer thereupon sent a memorandum to the claimant, asking in what respect his means differed from what they were on the last claim. He replied by a memorandum, which the officer forwarded to the Local Government Board and is stated *infra*, but made no further or other statement. On the 30th August, 1910, the sub-committee allowed him 5*s.* weekly. From this decision the pension officer

appealed, stating as the ground of appeal that the claimant's means exceed £31 10s. On the 3rd September, 1910, the claimant received notice of the appeal, but which did not give him any information as to when or where the appeal would be heard; and the claimant in his affidavit stated that no opportunity was given to him of appearing before the Local Government Board, to support his case. Mr. Barlas in his affidavit stated that "The Local Government Board had before them, on the hearing of the appeal, the documents and statements made on the first claim, and the documents in the second claim. They had also before them the memorandum of John Cairns, claiming that the cattle, which he was charged with having, did not belong to him, that they chanced to be grazing on the applicant's farm the day the officer called, 'but they were his son's and bought with his son's money.'" This memorandum was substantially the same as stated as the ground of his appeal of 3rd February, 1910. This statement was confirmed by the written certificate of the Rev. David Hay, Donemona, dated 29th March, 1910, which was also before the Local Government Board, when considering the appeal. Mr. Barlas's affidavit stated that the Local Government Board accepted the statement as accurate, and based their calculation of the applicant's means on the stock and crop on the farm after deducting the stock which he alleged were not his property; and on this basis the Local Government Board, were of opinion that his yearly means exceeded £31 10s., and that he was not entitled to a pension. The Local Government Board were also of opinion that the second claim was not properly brought, and was bad in law, having regard to the Act of 1908 and the regulations thereunder.

On the 21st September, 1910, the Local Government Board decided that the claimant was not entitled to any pension, and this was duly communicated to him. There were several letters, between claimant's solicitors and Mr. Barlas, but as the portions of them which were at all relevant were anticipatory of the arguments subsequently addressed in a conciser form to the Court, it is considered unnecessary to set out this correspondence. The claimant applied *ex parte* for a conditional order for a writ of

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certiorari, and the Court directed notice to be served on the Board.

Horner, K.C. (with him *Babington*), for the claimant, John Cairns:—

The notice of appeal given in this case neither specified the place where, nor the time when, the case would be dealt with by the Local Government Board, and thus the claimant had no opportunity of being present and of being heard in support of his appeal. This is not a fair or sufficient compliance with the regulations of October 15, 1908, R. 18 (3), made under section (10) of the Act (1). If that regulation means that infor-

(1) 8 Edw. 7, c. 40, s. 10 (1). "The Treasury in conjunction with the Local Government Board and with the Postmaster-General (so far as relates to the Post Office) may make regulations for carrying this Act into effect, and in particular: (*a*) for prescribing the evidence to be required as to the fulfilment of statutory conditions, and for defining the meaning of residence for the purposes of this Act; and (*b*) for prescribing the manner in which claims to pensions may be made, and the procedure to be followed on the consideration and determination of claims and questions to be considered and determined by pension officers and local pension committees, or by the central pension authority, and the mode in which any question may be raised as to the continuance, in the case of a pensioner, of the fulfilment of the statutory conditions, and as to the disqualification of a pensioner."

S. R. & O., 1898, p. 692, R. 18 (3). "Except where the appeal is brought by a claimant or pensioner, the committee shall send notice to the claimant or pensioner informing him that such appeal has been brought."

R. 19 (1). "In the case of any appeal to the Local Government Board, the Board shall cause such inquiry to be held, or take such other steps as they think necessary for the purpose of enabling them to come to a proper decision in the case."

The following is the form of notification, Form 11, first schedule to regulations:—

"Take notice that an appeal has been brought against the decision of the Local Pension Committee that you are entitled to a pension at the weekly rate of s. The question will now have to be finally determined by the Local Government Board.

"(*Signature of Clerk of Committee*),

"(*Date*) "(*Address of Clerk of Committee*)."

mation as to time and place may be withheld, it is contrary to natural justice and *ultra vires*: *R.* (*Lady Mowbray and Stourton*) v. *Local Government Board* (1). Under R. 19 (1), it is plain that the functions of the Board in dealing with appeals are of a judicial character: *R.* (*Pawley*) v. *Local Government Board* (2); *R.* (*Sinnott*) v. *Local Government Board* (3); *R.* (*Whyte*) v. *Local Government Board* (4). The statute and the regulations contemplate a *bonâ fide*, a searching, and a complete investigation in each case. Here if there was any semblance of inquiry it was of the most illusory and perfunctory character. The regulations are to be made for the purpose of carrying the Act into effect (section 10). See judgment of Lord Morris in *The Institute of Patent Agents* v. *Lockwood* (5).

The Solicitor-General and *Wylie* for the Local Government Board:—

Two questions are raised in this case. First, had the Local Government Board power to overrule their former decision? As to *res judicata* see *Badar Bee* v. *Habib Merican Noordin and others* (6). At p. 623, Lord Macnaghten sums up the law thus: "In the words of the Digest, lib. xliv., t. 2, s. 7, 'exceptio rei judicatae obstat quotiens eadem questio inter easdem personas revocatur.' It is not competent for the Court, in the case of the same question arising between the same parties to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time." This is not the case of newly discovered evidence. The evidence as to part of the property having been assigned to the claimant's son, was in the possession of the claimant when the first claim was determined. In *Newington* v. *Levy* (7), Blackburn, J., says (at p. 193): "I incline to think that the doctrine of *res judicata* applies to all matters which existed at the time of the giving of the judgment, and which the party had

(1) 42 Ir. L. T. R. 255; 43 Ir. L. T. R. 76.
(2) [1910] 2 I. R. 440, 447.
(3) *Ibid.*, 403.
(4) 43 Ir. L. T. R. 216.
(5) [1894] A. C., at p. 366.
(6) [1909] A. C. 615.
(7) L. R. 6 C. P. 180.

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the opportunity of bringing before the Court. But if there be matter subsequent which could not have been brought before the Court at the time, the party is not estopped from raising it."

When the claimant was asked by the pension officer what change in his means had taken place, the answer was in substance that there was no change, but that some of the evidence available had not been given when the first claim was decided. Therefore, when the whole matter had been decided by the Local Government Board on 6th April, 1910, they had no power to overrule their former decision. It may be that if there had been any change of circumstances there might be jurisdiction to re-hear the case, but here there was no change. At most some further evidence was given, but this evidence was available when the decision was given in April, and the observations of Holmes and Cherry, L.JJ., in *Pawley's Case* (1), could never have been intended to apply to such a case. As to reviewing orders under the Workmen's Compensation Act, see Hanna, Workmen's Compensation Act, 2nd ed., p. 95, and *Crossfield and Sons* v. *Tanian*, [1900] 2 Q. B. 629, there cited. Even in *Radcliffe* v. *Pacific Steam Navigation Co.* (2), it seems to have been assumed that some change of circumstances would be necessary to reopen a decision under that Act, although the Judges of the Court of Appeal were inclined to the opinion that the amount which a workman is capable of earning could not possibly be *res judicata*. But that was because, as the Master of the Rolls pointed out, a review, under clause 16 of the first schedule to the Act in itself implies a change of circumstances.

Secondly—Was the claimant entitled as of right to be present at the hearing of the appeal, and for that purpose to have notice of the time and place where the appeal was to be heard? The appeal is only given *sub modo*.

By section 7 (1) (*c*) it is to be "within the time and in the manner prescribed by regulations under this Act." Contrast the regulations as to the proceedings of the local pension committee with those as to appeals. Rule 14 (1) prescribes that the committee shall not give their final decision on the claim without giving the claimant an opportunity of being

(1) [1910] 2 I. R. 447. (2) [1910] 1 K. B. 685.

heard. By sub-clause (2) they are not to decide adversely to the claimant without giving him an opportunity of being heard. Under (3) he is to get notice of any adjournment; and under (4) he is entitled to attend and be heard at any such adjourned meeting. No such provision is to be found in regulations 18, 19. The reason is obvious. The local committee have only to deal with cases in their district. The claimants and the pension officer are resident in the district and can conveniently attend. The central authority has jurisdiction over the whole country, and it would be absurd to expect that claimants who are little removed from a state of pauperism could be expected to make their way to Dublin in every case, in order to give *vivâ voce* evidence; and if such a practice prevailed, it would be impossible for the Board to get through the work, and no useful object would be thereby attained. In two years there were 44,000 appeals to the Local Government Board. It would be impossible to fix a special day for each case.

[In reply to the Lord Chief Justice, the *Solicitor-General* said that he would admit in this Court that the decision of the Local Government Board upon appeals was a judicial act.]

Babington, in reply:—

From the fact that the claimant succeeded before the local pension committee, which had previously decided against him, it may fairly be inferred that the case was one which deserved re-investigation. The Board might have either sent down an inspector to take evidence, or got a note of the evidence taken by the clerk of the local pension committee: *Radcliffe* v. *Pacific Steam Navigation Company* (1) decides that the question, what a man earns, or is able to earn, cannot be finally decided at any period of time, and cannot therefore be the subject of *res judicata*. In *Pawley's Case* (2), the question of jurisdiction to rehear a decision granting or refusing a pension was expressly left open by the Court of Appeal. The Local Government Board in this case accepted that jurisdiction—they say that they reheard the case on the merits, and it would be inconsistent for them to assert

(1) [1910] 1 K. B. 685. (2) [1910] 2 I. R. 447.

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that it was *res judicata*. The claimant's pension was taken away without his being heard. A decision was pronounced against him behind his back.

The case comes within the principle of *The King* (*Lady Mowbray and Stourton*) v. *Local Government Board* (1); sect. 7, and sect. 10, sub-sect. (*b*), are provisions dealing with procedure, and do not take away rights. If the effect of regulations 18 and 19 is to exclude the claimant from being present at the hearing of the appeal and bringing forward evidence to support his case, they are *ultra vires*.

Jan. 31.

LORD O'BRIEN, L.C.J.:—

I shall assume for the purposes of my judgment that it was competent for the applicant to proceed twice for an old age pension, though I am of the opinion that, in this case there being no new facts or new evidence, it was not competent for him to do so. However, the main question debated raised a most important point as to the administration of the Old Age Pensions Act of 1908, and I shall deal with that point in some detail.

The question is this—Must the Local Government Board, in the case of an appeal, before the matter of the appeal be determined by them, give notice, not alone that an appeal "has been brought," but notice also as to the time and place when and where that appeal is to be heard and determined?

All the facts of the case, so often alluded to, are set out at length in the affidavits, but the particular facts which raise this important question are few.

The applicant Cairns was awarded a pension by the Strabane sub-committee of the local pension committee of the county of Tyrone, and there was an appeal to the Local Government Board against the allowance of the pension by the sub-committee. Notice was given that an appeal "had been brought," but neither the time when, nor the place where, the appeal was to be heard was stated in that notice, nor was any notice to that effect given. Should notice of such particulars have been given?

(1) 42 Ir. L. T. R. 255; 43 Ir. L. T. R. 76.

Was it a necessary condition precedent to hearing and determining the question involved in the appeal that the notice, or a notice, should have stated the time and place of the hearing? I think not.

At an early stage of the argument the Solicitor-General, who appeared on behalf of the Local Government Board, pointed to the 7th section, and, I think, to the 10th section, of the Old Age Pensions Act of 1908, which enabled regulations as to procedure to be made. These regulations provided that the local pension committee should not decide against an applicant without giving him an opportunity of being heard: see regulation 14 and its various sub-sections. This had reference to the hearing before the local pension committee; but the regulation as to notice of appeal is regulation 18 and its sub-sections, especially sub-sect. 3, which provides that notice shall be given that an appeal "has been brought"; see sub-sect. 3 of regulation 18, and Form 11. Was this notice, which did not state the time and place of hearing, sufficient? We think it was. Upon receiving notice that the appeal had been brought, it was open to the applicant—an opportunity had been given to the applicant—to apply, if he thought fit so to do, to have himself and his witnesses heard personally, and to bring forward such evidence as he should desire. So far as concerns the application to hear the applicant and his witnesses personally, I think the Local Government Board had a discretion, of course to be fairly and honestly exercised, as to whether they would comply with the application. I emphasize the word "discretion," because, if it is obligatory on the Local Government Board, before coming to a decision, to hear in person both applicants and their witnesses, the administration of the Act might be so blocked as to become practically impossible. This view is borne out by regulation 19, in its first sub-section. I am of opinion that all these regulations are reasonable, legal, and in no way *ultra vires*. I repeat that there must be a real, *bona fide*, and honest exercise of discretion by the Local Government Board as to whether they should comply with the request of the applicant to be heard in person or by his witnesses.

It appears to me that the only point, the only complaint

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made by the applicant, was that certain cattle were dealt with as his, and not as his son's property. The correspondence and Mr. Barlas's affidavit (especially paragraph 8) show that, on the appeal to the Local Government Board, the son and not the applicant was credited with the ownership of these cattle. I am of opinion, in this case, that an opportunity of being heard was afforded to the applicant, and that a determination was not reached "behind his back."

I asked the Solicitor-General whether he would admit that the determination of the Local Government Board was a judicial function. He said that, whatever he might do in the Court of Appeal, he would admit here that it should be dealt with as a judicial matter. I wished to guard myself. This point was referred to by my brother Gibson and myself in *Sinnott's Case* (1).

I do not know of any case where a full Court unanimously, or by a majority, categorically decided that these controversies under the Old Age Pensions Act were judicial, as distinguished from mere administrative, matters. No doubt such matters were assumed to be judicial matters; but was it categorically decided that they were so? A direct categorical decision on this point would be helpful in the administration of the Old Age Pensions Act; I offer no opinion on the subject.

MADDEN, J.:—

The question in this case is, as to the legality of an order made by the Local Government Board, on the 21st of September, 1910, on appeal from an order of the pension committee allowing the prosecutor a pension at the rate of 5*s.* a week. This order, by which the application was refused, the prosecutor alleges to have been made without and in excess of jurisdiction, without affording him an opportunity of being heard, and behind his back.

Although the case ultimately resolved itself into the determination of the short point mentioned by my Lord, various important questions were brought before us in the course of the argument

(1) [1910] 2 I. R. 403.

with regard to the procedure prescribed by the statute and the regulations, where an application is made for an old age pension, and as these questions have in my opinion considerable bearing upon the decision of the case, I shall state the result of my consideration of them.

The statute provides that an application for an old age pension is to be made to a body constituted by the Act, and called "the local pension committee." Each claim and question coming before this committee is to be referred for report and inquiry to an officer appointed by the Treasury, called the "pension officer." It is the duty of the pension officer to inquire into and report upon each claim or question, and it then rests with the pension committee to give their decision upon the claim or question. This decision is to be made "on the receipt of the report of the pension officer, and after obtaining from him, or from any other source, if necessary, any further information as to the claim or question." The decision of the committee, if unappealed from, is final and conclusive.

Under the 10th section of the Act, power was given to the Treasury in conjunction with the Local Government Board, and (as to certain matters) with the Postmaster-General, to make regulations for carrying the Act into effect, and in particular (amongst other things) for prescribing the evidence to be required as to the fulfilment of statutory conditions, and the manner in which claims to pensions may be made, and the procedure to be followed on the consideration and determination of claims and questions to be considered and determined by pension officers, and local pension committees, or by the central pension authority.

By the 13th and 14th of the regulations made under the Act, the procedure for the determination of claims by the pension committee is prescribed. If the pension officer reports in favour of the claim, and the pension committee agrees with his report, the claim is allowed. If the pension officer reports adversely to the claim, and the committee agrees with his report, "the committee shall not give their final decision on the claim without giving the claimant an opportunity of being heard." There is a similar provision applicable to an adjourned meeting for further investi-

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gation, at which the claimant is entitled to attend and be heard. In every case where a claim is disallowed, notice is to be sent to the claimant stating the grounds of disallowance, "and that the claimant is entitled to appeal to the Local Government Board against the decision of the committee."

The provisions as to appeals are contained in the 18th and 19th regulations. "Except where the appeal is brought by a claimant or pensioner, the committee shall send notice to the claimant or pensioner informing him that the appeal has been brought." By the 19th regulation, the Local Government Board are directed, in the case of any appeal, to "cause such inquiry to be held, or take such other steps as they think necessary for the purpose of enabling them to come to a proper decision in the case." Notice of every decision of the Board is to be sent to the pension committee, who must send information thereof to the pension officer and to the claimant or pensioner.

The regulations as to appeals contain no provisions such as that contained in the regulations as to procedure before the pension committee, rendering it obligatory upon them to afford a claimant or appellant an opportunity of being heard. The Solicitor-General contends that no such obligation is cast upon the appellate tribunal. On the contrary he relies on the 19th regulation as enabling the Board to proceed *ex informata conscientia*—though he does not adopt the phrase—when they have made such inquiries and taken such other steps as they think necessary for the purpose of enabling them to come to a proper decision.

If, as the Solicitor-General admitted, we must deal with the case on the assumption that the Local Government Board act judicially in entertaining an appeal under this Act, the omission of a requirement obliging them to afford a claimant an opportunity of being heard, and the obligation imposed on a purely administrative body like the pension committee, are intelligible. It would be unnecessary, and indeed officious, to introduce into regulations dealing with the discharge of judicial duties, a provision that an essential requirement of natural justice should be complied with. Regulation 18 (3) requires that "except where the appeal is brought by a claimant or a pensioner,

the committee shall send notice to the claimant or pensioner informing him that the appeal has been brought." I do not regard the 19th regulation as inconsistent with the right of the claimant to be heard—a right which would seem to be implied in the provision requiring him to be served with notice of the appeal. If it were to be so construed, it would be, in my opinion, *ultra vires*. The 10th section of the statute, enabling rules to be made dealing with evidence and procedure, would not, in my opinion, authorize a regulation affecting the right of a claimant. Regulation 19 (1), as I read it, is within the powers given by this section. It deals with evidence, and directs the appellate tribunal to institute and act on independent inquiries as to the case before them; in this respect going beyond the action of ordinary appellate tribunals, which usually decide on the evidence brought before them by the parties to a proceeding.

An appeal under the Act is not to be treated as merely a *lis inter partes*, but as the subject-matter of inquiry of a judicial character which, as it affects the interests of the applicant, ought to be conducted in accordance with the principles of natural justice.

The Solicitor-General has raised an important question as to the effect of the decision of the Local Government Board on the former appeal. The question for decision being as to the means of the claimant, he contends that the matter is *res judicata* and that it cannot be opened.

In my opinion, the principle of *res judicata* is inapplicable to applications under the Old Age Pensions Act. No doubt the former decision is final and conclusive, so far as regards that particular application. My opinion is founded upon the nature of the statutory conditions which must be fulfilled in order to entitle an applicant to receive a pension. As regards means, the applicant must satisfy the pension authorities that his yearly means, as calculated under the Act, do not exceed £31 10*s*. The Solicitor-General contends that a decision that a claimant is possessed of a certain farm and a certain number of cattle is *res judicata* on the question of his means, and that where no change is alleged as to the property owned by the claimant the question of means cannot be reopened on a subsequent application.

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But the property owned by the claimant is only one element in the calculation of his annual income. Shares in a mine, for example, yielding him an income of £50 in one year, may become worthless in the next, or may involve him in a liability. The income derived from a farm and the stock upon it is variable, though not to the same extent. One year's income is to be taken as that of the succeeding year, but only in the absence of other means of ascertaining the income. The case seems to be analogous, as far as regards the application of the principle of *res judicata*, to an application under the Workmen's Compensation Act. The Court of Appeal in England decided, for reasons similar to those which exist in the present case, that the question of the amount of a workman's earnings cannot be finally decided at any particular period of time, and, therefore, cannot be regarded as *res judicata* : *Radcliffe* v. *Pacific Steam Co.* (1).

The question remains for decision : Have the Local Government Board, in adjudicating on the appeal in this case, satisfied the requirements of natural justice? In my opinion they have done so by giving the claimant reasonable notice of the appeal. This notice was received on the 3rd, and the decision of the Board was given on the 22nd of September. It is not suggested that in this or in any other case the Board refused to give a claimant interested in an appeal an opportunity of bringing his case before them for consideration.

The Local Government Board is one of several great administrative bodies who find themselves, in the course of administration, performing duties which this Court regards as judicial. The order in this case is similar to that in *Pawley's Case* (2), as to which the Lord Chancellor said (p. 450) :—"It was one plainly open to *certiorari*, as it was made in alleged discharge of a judicial function given to them, and it deprived Pawley of his pension, and therefore affected his right." It is impossible to lay down any hard and fast rule as to the requirements of natural justice in such a case. It was never contemplated, and it would be unreasonable to hold, that a formulated procedure, such as that which has come into use in Courts of Justice, should be

(1) [1910] 1 K. B. 685. (2) [1910] 2 I. R. 440.

adopted. But the claimant should be given an opportunity of presenting his case to the Board in some way suitable to the character of the inquiry, and it would probably be in writing. This opportunity was, in my opinion, afforded by serving him with a reasonable notice of the appeal. Mr. Horner admits that the requirements of justice would have been satisfied if the notice had stated the date and place at which the appeal would come on. The Legal Diary is a useful, though somewhat modern, institution, but it is no part of the essentials of natural justice. The applicant had a reasonable opportunity afforded him of ascertaining when his case would come under consideration, and of bringing before the Board a statement of the facts upon which he relied in support of his application.

WRIGHT, J.:—

The case has been argued before us on the basis that the order of the Local Government Board was made in discharge of a judicial function given by the statute. There are dicta to this effect of two of the Judges of the Court of Appeal in *Pawley's Case* (1), if, indeed, it is not involved in the decision of that case.

The Local Government Board had already by their order, dated the 6th of April, 1910, affirming the order of the local pension committee, refused the claim of the applicant to a pension. *Primâ facie* that order is final and conclusive under section 7 (2) of the Act; it can only be reconsidered if it can be shown that after the order was made there has been a change of circumstances, or, if the view of Lord Justice Holmes be correct, as expressed in *Pawley's Case* (1), at p. 453, if either the claimant or the pension officer "has subsequently ascertained the existence of relevant facts, or evidence of such facts, previously unknown to him."

In this case no change of circumstances since the making of the previous order is suggested. The circumstances of the claimant are the same since the order as before; the evidence in support of his case is different. He brings forward fresh evidence to support his claim. It is a mistake to call it new evidence, in the sense of

(1) [1910] 2 I. R. 440.

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being newly discovered evidence, or evidence not previously known to him. It consists, as I gather from his affidavit, of the evidence of himself and his son, which was always procurable, and open to him to bring forward. The principle now sought to be established goes entirely beyond any previous decision, or judicial dictum, and would, if sanctioned, let in any number of fresh applications. The finality attached to an order by section 7 (2) would disappear. This alone would, in my opinion, be sufficient to dispose of the claim made by the applicant.

The Local Government Board reversed the order of the local pension committee, allowing the claim for a pension, and disallowed the claim, as they considered that the applicant's means were in excess of the statutory limit, and no evidence had been furnished showing that the claimant's circumstances had altered since the disallowance of the previous claim (see letter from Local Government Board of 6th October, 1910).

It appears that the applicant on the 3rd September received a notification in accordance with the rules that an appeal had been lodged against the order of the local pension committee allowing his claim to a pension, and on the 25th September he was informed that the Local Government Board had disallowed his claim.

Mr. Barlas, the Board's Secretary, in his affidavit, paragraph 8, sets out the grounds of the Board's decision. They are twofold, one based on fact, the other on a legal ground—(1) They accepted the applicant's statement as to his means as accurate, and based their calculations of his means on the stock and crops on the farm, after deducting what he alleged were not his but his son's, and on this basis the Board decided that his yearly means exceeded £31 10*s*. (2) The Board were of opinion that the second claim was bad in law and untenable, a previous claim having been made and refused.

It has been argued for the claimant that the adjudication of the Board was bad, on the ground that it was made in the absence of the claimant, and without giving him a hearing and an opportunity of being examined, and bringing forward his witnesses; and that there has been a violation of natural justice in so depriving him of his rights in his absence.

It is said he should have got notice of the hearing. Admittedly

the only notice he got was the notice of the 3rd September already referred to, that an appeal had been lodged; he was never informed when or where that appeal would be heard, and had no opportunity of being heard by the appellate tribunal.

It is certain that the appeal was lodged and decided in strict compliance with the rules made under section 10 of the Act. These rules have been criticized at length before us, and some of them, and particularly rule 19, have been challenged as being *ultra vires*. I propose to consider them shortly. Rule 14 deals with the procedure in cases before local pension committees, and in each one of its sub-sections provides for hearing the claimant, if he so desires. This seems obviously right and just, considering that this is a local inquiry, held at some place in the locality where the local committee, the applicant, and the pension officer can conveniently attend. Rules 18 and 19 provide for the hearing of appeals by the Local Government Board; they clearly do not contemplate a hearing in the ordinary sense of the word, the attendance of the applicant, or the examination of witnesses. The Local Government Board in making these orders may be, and I assume are, making a judicial determination; but the Board is not a Court, with a Court list, and public sittings, publicly notified. They are a great central controlling body, and to apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal, seems to me completely to mistake their true position and functions.

Under the rules 19 (1), they may make inquiries, or take such other steps as they may think necessary to enable them to come to a proper decision in any case. In this case the Board might, if they deemed it necessary, have called for the attendance of the claimant, or the claimant's solicitor might have asked the Board to allow the claimant to appear before them, and might have shown special grounds in support of his application; but it is plain that, in the absence of anything exceptional, or any special request, the Board would decide on the documents laid before them under rule 18. In this case one of the documents so furnished to the Board was the statement in writing by the applicant of his new case, as I may call it. It was for him to have made any special application; in the absence of such, he

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and his solicitor should have assumed that the Board would decide, in accordance with the procedure prescribed by the rules, on the documentary evidence laid before them (under Rule 18).

I am of opinion that these rules are rightly made under section 10, and to carry out the objects there specified. On all grounds I think the contention of the applicant has failed.

Solicitors for the applicant: *Wilson & Simms.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

J. G. T.

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THE LANGHAM STEAMSHIP COMPANY, LIMITED, *v.* JAMES GALLAGHER (1).

(1907. No. 13415.)

Charter-party—Strike clause, effect of—"Workmen essential to the discharge of the cargo," meaning of—"Loading" and "discharge"—Demurrage.

A charter-party contained a "strike" clause providing that "If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days of discharging shall not count during the continuance of such strike or lock-out." On the arrival of the ship at the port of discharge, a strike of carters was in existence, in consequence of which the docks had become congested; this condition of affairs rendered it impossible for the consignee to accept delivery of the cargo, there being neither space for the cargo in the docks, nor means of taking it away when tendered over the ship's rail.

Held, that the carters in these circumstances were not a "class of workmen essential to the discharge" within the meaning of the clause.

Held, also, that "discharge" is a joint act, necessitating co-operation on the part of the ship and the receiver of the cargo, and that the obligation of the ship under this term is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side.

NEW TRIAL MOTION.

The plaintiffs sought to recover demurrage at the rate of 4*d.* per ton on their steamer's gross register tonnage for seventeen

(1) Before MADDEN, KENNY, and WRIGHT, JJ.

days, from July 30th to August 17th, 1907. The action was tried before Gibson, J., without a jury, at the Spring Assizes, 1909. The trial commenced at Belfast and was adjourned to Dublin, owing to the illness of his Lordship.

The material facts of the case are fully set forth in the judgments of the Court, and in the following report of the Judge at the trial, which was as follows:—

"This action was tried by me at Belfast and Dublin, the trial having begun at Belfast Spring Assizes, 1909, and having, in consequence of my illness there, been adjourned to Dublin, I thought that the case had been settled, when in April I was asked to resume the hearing, and dispose of the action. The action was for demurrage. Three defences were relied on:—(1) That the defendant was protected by the strike clause in the charter-party; (2) That there was a special contract that defendant was not to be liable for demurrage beyond three and a half days (which amount was lodged in Court); (3) That there was a special contract that partial days were not to count as full days. The notice of motion impugns findings, and conclusions of fact and law, on all points.

"A shorthand writer was, by consent, sworn. I refer to his note for the oral evidence. In addition to such evidence all the correspondence (letters, telegrams, &c.) was entered, with bill of lading and charter-party, and the following proofs:—(1) An analytical summary of the discharge, with days and modes of disposition; (2) The number of gangs employed, with days and hours of work; (3) Summary of defendant's sales; (4) The ship's log; (5) The official record of the various vessels discharging in Dufferin and York Docks respectively, during the period in controversy.

"I gave a written judgment, to which I refer. The main questions argued before me were on the first and second defences.

"The material dates were as follows:—"The carters' strike began about July 4th; defendant bought the cargo afloat on July 15th; the vessel arrived on July 26th, and was ready for discharge in Dufferin Dock on July 27th; the discharge began on Monday, August 5th, and was completed on August 17th; and the strike ended on August 16th.

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"There were important interviews between Ballingall (manager of plaintiffs) and defendant on July 24th and August 10th, and between Hamilton (representing plaintiffs) and defendant on August 7th.

"The charter-party fixed sixteen running days as the time for loading and unloading, and threw on the consignees (apart from the strike clause) an absolute obligation to discharge within two and a half days, thirteen and a half days having been spent in loading.

"There were two questions on the strike clause—(1) Did it apply to demurrage after the running days had expired? In the absence of authority the other way, I held that it did apply to the contract period of demurrage, though no doubt the exclusion of Sundays in the demurrage periods may supply an adverse argument, Sundays being expressly excluded from the running days.

"The second question was as to the effect of the strike clause, within which, as an exception, the defendant had to bring himself.

"There never was a strike of stevedore's men at the ship, save on part of one day, and the difficulty of disposing of the cargo was argued to be a reflex or indirect consequence of the carters' strike.

"I held that defendant was liable for the ten days, from Thursday, August 8th, to Saturday, August 17th, as discharge overside was not shown to be impossible by defendant, on whom the onus lay, but I allowed credit for half a day, when work was stopped by partial strike. I also thought that defendant, in any view, was responsible for not slabbing on the quay at an earlier period, and also probably for August 8th, on which day no work at all was done. Whether defendant might or might not be excused by stoppage of outlets caused by external strikers, whether in carting, railway service, or otherwise, appeared to me a difficult question, and I did not deem it necessary to decide it.

"Assuming that defendant might be so excused for at least portion of the ten days, I found that in existing conditions, as regards land discharge at that particular dock, defendant had done all in his power and was not to blame, save to the limited extent above indicated. I found against the special contracts.

"The case was treated in argument on the basis that defendant's liability, if it existed, extended to the entire number of days sued for; but I held that, on the course of dealing, demurrage could not be carried further back than August 8th. I stayed execution and extended time for moving.

"Signed,

"J. G. GIBSON."

The strike clause referred to is set out in the judgments of Madden, J., p. 363, and KENNY, J., p. 375, *infra*.

The following judgment was delivered by Mr. Justice Gibson at the trial:—

The defendant being sued for demurrage in respect of a cargo of wheat carried by the "Langham," which he bought on July 15th, 1907, on the terms that he should have six days to discharge, relies on three defences, two going to the entire cause of action, one only an answer in part. They are—(1) He is absolutely protected by the strike clause in the charter-party; (2) There was a special contract that demurrage should be calculated at three and a half days only; (3) Portions of days should not be reckoned as full days.

The charter-party, incorporated in the bill of lading, by clause 7, gave sixteen running days for loading and unloading, and ten days for demurrage at 4*d.* per ton; and clause 13 contained an exemption from liability where the cargo could not be discharged by reason of strike of any class of workmen essential to discharging the days for discharging not to count during the continuance of such strike. Thirteen and a half days having been spent in loading, there were only two and a half running days left for discharge, as between the ship and the consignee, though the latter had, as against his vendor, the right to six free days.

But for the strike clause, under a charter-party of this type with a rigid time limit, there was an absolute obligation on the cargo-owner to discharge, which could not be affected by strikes,

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inability to handle or dispose of the cargo from want of shed accommodation, or of cartage, or otherwise: *Budgett* v. *Binnington* (1); *Hick* v. *Raymond and Reid* (2); *Hulthen* v. *Stewart* (3). The Langham was an arrived vessel on July 27th, whether she was in berth or not: *Leonis S.S. Co., Limited* v. *Rank Limited* (4).

The strike clause must be read as an exception from the unqualified obligation on the charterer. Two questions arise on it—(1) Does it apply to a strike outside the ship's and stevedore's work, affecting the ability of the charterer to get away and dispose of the cargo? (2) Does it apply to demurrage after the running days had expired? With regard to this latter question, as the running days might be exhausted in loading, and there is an agreed-on period of demurrage at a price, I am inclined, in the absence of authority the other way (and none was cited), to hold that the strike clause, where applicable, extends to the demurrage days proper.

The first, the large, question is one of difficulty. The *onus* is on the defendant to bring himself within the exception. Does the word "discharged" cover the time and series of acts outside the vessel after the merchant would in ordinary course have received and possessed disposing power over the cargo, the ship's duty having been completely performed?

The process of discharge is accomplished on board, partly by the ship's gang, who fill, hoist, and carry; and partly by the merchant's gang, who receive bags, weigh, and carry out. Here there was the same stevedore for ship and consignee, with double duty. The normal mode in which the consignee disposes of cargo when received is by shedding, carting, trucking, by putting overside into lighters, usually for purchasers *ex* ship; and towards the end of discharge, portion may be slabbed on the quay. Such modes of handling the cargo, when discharged from the ship, are, I suppose, common in most ports, and can hardly be described as customs binding the ship's discharge.

In the *Helios Case* (5) cited by Mr. M'Grath, there was a true

(1) [1891] 1 Q. B. 35.
(2) [1893] A. C. 22.
(3) [1903] A. C. 389.
(4) [1908] 1 K. B. 499.
(5) [1897] 2 Q. B. 83.

custom in relation to the ship's duty in discharging. Here there is no question as to the extent and duration of such duty, the point raised relating to inability of the merchant to take away the cargo, if, and when, delivered. Ordinary business methods are not custom—that is a local law binding all coming to the port. But for the strike clause, the defendant would, beyond doubt, have been liable for all detention not attributable to fault or breach of contract on the ship's part. In the present case, there was no strike of the dock labourers' gangs employed in discharge, save for half a day on August 13th. They worked perhaps with less willingness than usual; but there is no tangible proof of delay from this cause. The ship would have been discharged without substantial delay, if there had been sufficient shed accommodation, and there had been no cartage obstruction. Mr. Gordon contends that these matters are entirely outside the scope of the strike clause, and he points out that discharge over side was always practicable, as I think it was. The congestion of the sheds, as a consequence of the carters' strike in relation to the cargoes of other vessels, is also said to be merely an indirect consequence, which could not be treated as caused by such a strike as the clause contemplates. Before I state my conclusion as to the effect of the strike clause, I shall first briefly summarize the facts. There has been some controversy in the oral evidence, but many facts are admitted, or are established by certain proof; such as (1) the admittedly accurate summary of quantities discharged, with dates, and modes of discharge; (2) the defendant's sales book; (3) the list of gangs at the various holds, with days and hours; (4) the official records as to vessels discharging in the York and Dufferin Docks; (5) the log; (6) the correspondence. All this last was treated as entered; most of the letters, &c., not passing between the parties would have been evidence on cross-examination, or could have been used to refresh the memory; or, as in *Reg.* v. *Coll* (1), not as substantive evidence, but to set up the credit of the witness, and to show that his evidence was not the result of subsequent invention.

The history of the case is as follows:—The dock labourers'

(1) 24 L. R. Ir. 522.

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strike began early in July, but was at first confined to a certain class of business and to a certain area. It had not affected Burns's ability to discharge up to July 17th (see his letter of that date). M'Cann's evidence is to the same effect. Events marched, or were supposed to be marching, rapidly, for on July 22nd Burns wrote to the plaintiffs that work into sheds was completely stopped, and, save into lighters or coasters, discharge was then impossible. But that Burns's statement was exaggerated, or, at least, falsified in result, appears from the actual discharges proved to have taken place. On the 15th July the defendant had bought the cargo, so that both he and the plaintiffs were faced with an anxious and difficult problem. Ballingall having received from the Shipping Federation a telegram, dated July 23rd, to the same effect as Burns's letter of July 22nd, came over and had an important interview with the defendant (which I postpone for the present). The vessel arrived on the 26th, and would have berthed in the York Dock but for want of available shed accommodation there (see Burns's letter, 26th July).

She was brought to the Dufferin Dock, east side, on July 27th, when she was ready to discharge, and was an "arrived" ship. Another vessel, the "Gael," was already at that side; the quay was partly encumbered with cargo; there was no shed accommodation; and for that reason, and not directly on account of the strike, no discharge was attempted at the east side. Tinsley's evidence shows this. The dilatory behaviour of the "Gael" is not easy to account for in view of what was being done in the case of other vessels. There were on July 26th, 27th, and 29th, in Dufferin Dock discharging, the following vessels besides the "Gael"; the "Helder," with a wood cargo, the "Noemi," and the "Bardowie." This last vessel was consigned to the defendant, and was occupying a shed berth at the west side. Her captain refused to move out until his cargo was unloaded, which was done on Saturday, August 3rd, when the "Langham" moved in and took that berth. No discharge was attempted that day for want of bags, which the defendant alleged he could not get to the dock in consequence of the carters' strike. How the bags were brought afterwards does not appear. At this time the west shed was largely filled with the "Bardowie's" grain.

The discharge began on Monday, August 5th, and was continued at various rates of progress and with varying gangs, till Saturday, the 17th August, when the vessel being completely unloaded, went away, having been chartered on the 12th August, for a voyage to begin on the 19th. The analysis of each day totals, and of the disposal of the output over the side, into sheds, wagons, carts, and on the quay is important. No work at all was done on Thursday, August 8th. This is variously explained. The log states that the shed was full, though the telegram of the same day says that the shed would hold 300 tons more. Burns's letter of August 8th accounts for the cessation, in part, by the non-arrival of a coaster—a risk obviously to be borne by the defendant. On the 13th half a day was lost owing to the men refusing to carry to the Midland wagons. This was the only direct strike in connexion with the discharge. The quantities each day varied considerably, and my conclusion is that the delay was caused, not by the refusal of men to hire or work, but by shed accommodation not being adequate, carting being restricted, and over-side discharge not being employed more extensively.

Important interviews took place on August 7th between Hamilton, representing the plaintiffs, and the defendant; and between the plaintiffs and the defendant on the 10th, which I will refer to in connexion with the contract to forego demurrage relied on by the defendant.

The strike ended on the 16th. On that and the following day a large proportion was carted. On the 15th and 16th slabbing was resorted to for the first time, 127 tons 10 cwts. being so disposed on the former day, 40 tons 16 cwts. on the latter. In my opinion at least 400 tons could have been slabbed without obstructing egress or circulation; and, had this expedient been adopted earlier, two days would have been saved. For slabbing, permission was required, but this was more or less a formal matter. Such permission was asked for on August 14th, and given on the 15th. Had it been asked before, it would have been granted in the same way.

With regard to other vessels being discharged in the Dufferin Dock, the history of the "Noemi" and the "Gael" shows how hard it is to draw any satisfactory inference as to the effect of the carters'

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strike. The "Noemi," a sailing vessel with wheat cargo, arrived in the middle of June, and her discharge, with a short interruption for repairs, took thirty-five days. The "Gael" arrived on the 15th July (at a time when Burns and M'Cann were operating without difficulty), and was left without any attempt at discharge till August 16th, when the strike was over. In both these cases it is hard to suppose that what was possible for the "Langham," arriving later, was not equally possible for them if they had wished, and had made any real effort to unload. The case of these two vessels shows how difficult it is to bring shed congestion into the strike clause, when such congestion may have resulted from default of other owners, and their lack of resource and energy. It would be an impossible inquiry to ascertain how far the fact of the sheds being full was due to strike, or to apathy and default of shed-owners. The "Gael," after the strike was over, took fifteen days to discharge 2700 tons. In the Dufferin Dock there were unloading, besides the "Langham," from the 13th to the 17th August, inclusive, one or two other vessels, as we know from the harbour figures, but no details as to discharge of these are given in the evidence.

The York Dock had a number of vessels discharging continuously from the 26th July to the 17th August, sometimes five, sometimes more, Discharge was also going on in the Spencer Dock.

The gangs employed on the "Langham" all belonged to the Dockers' Union, which, though in sympathy with the Carters' Union, was not part of, or identified with, the latter Union. No striking carters were included in these gangs; but such strikers were included in the gangs of other vessels, their object being apparently to make up for the loss of their carters' wages—an object which could only be obtained by the discharging gangs neither going on strike themselves nor obstructing the free passage of the cargo discharged. Still there was a certain amount of restlessness and insubordination.

With regard to the shed capacity in the Dufferin Dock, and the available accommodation there, and as to the impossibility of getting away the cargo by carting to a greater extent than the defendant did, I accept the evidence of the defendant and his witnesses. Given the weather conditions and the strike dangers,

I also think that slabbing would not have been a safe or reasonable mode of disposing of the cargo as a whole, though towards the end of the discharge such mode was reasonable, and I find that slabbing, owing to the state of the quay, could not have been used to a greater extent than I have already indicated.

I also find that the defendant, as regards landward discharge, did what was reasonably possible to dispose of the cargo, and did not intentionally, or for any purpose of his own, delay the unloading. Burns, however, his stevedore, only put on the gangs necessary to discharge the quantity which could be accommodated and dealt with; and had there been available shed space, I have no doubt that, as far as gangs were concerned, the cargo could have been unloaded in six days or thereabouts. The ship could not unload if there was no one to receive; and the duty of ordering gangs, if dependent on the capacity of the receiver, would rest on Burns as merchant's stevedore, not on Burns as stevedore of the ship. I do not deem it necessary to discuss the strike evidence in detail. The effect, influence, and contagion of the strike are exaggerated on the one side, and minimized on the other. In result the strike proved more restricted in character and extent than was at first feared, as the history of the various docks in relation to discharge shows. It is sufficient to state my conclusions of fact.

I am of opinion that defendant is not protected by the strike clause, as discharge was not made impossible by the strike. On the authorities cited by Mr. Gordon it is doubtful whether the clause applies to obstructions affecting the disposal of the discharged cargo, especially where such obstructions consist of want of storage accommodation caused by the congestion of cargoes, the result of the carters' stoppage. Here there was no strike of stevedore's men, or of any directly employed in discharge. Assuming, however, that the clause may apply to stoppage of outlets by external strikers, I think that overside delivery never was impossible, and that slabbing, to the limited extent above stated, was possible, and should have been resorted to at an earlier date in order to accelerate the clearing of the steamer. I see great difficulty in bringing shed congestion within the strike clause. The degree and cause of such congestion—particularly in

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the York Dock, where there was continuous discharging—are uncertain. The defendant preferred the Dufferin Dock. Possibly, if in the York Dock, the vessel could have been unloaded more speedily. Again, sheds might be occupied for an unnecessarily long time owing to apathy, or for the convenience of merchants. Further, supposing that the strike of carters had been over on July 27th, but sheds were then full, would that have fallen within the strike clause? Or, suppose the sheds were burnt in course of a carters' riot? When the clause is extended to obstruction, external to the ship and her duty of discharge, the difficulty of application is very great, depending, as it would, on accidental conditions outside the ship, after the ship's duty had been discharged. Subject to the question of the special contract to forego demurrage, the defendant is liable for demurrage. But where does the liability begin? The defendant had only two and a-half days to unload. Looking at the whole evidence, the atmosphere of compromise in this critical situation, the defendant's letter of the 6th, and the plaintiffs' letter to Hayes of August 6th, and his telegram, and the demurrage notices, I think the plaintiffs dealt with the defendant on the footing that, though further demands might be open, the two and a half days were not to be taken to expire before August 7th; and that demurrage, as per charter-party, only began to run on and from August 8th. The question of liability on and from August 8th was let stand over, but both parties acted on the faith and assumption that the discharge was to be taken as beginning on the 5th. It would be contrary to good faith and the accepted course of discharge to go behind that date and carry the defendant's liability further back. The 5th was adopted as the first day of discharge proper, and represents a tacit compromise of doubtful rights as to which neither party was confident. The defence can, if necessary, be amended to carry out this view, if the point is not open on the traverse of demurrage. The 5th was accepted on both sides as the starting-point from which the unexhausted residue of running days was to be reckoned. The arrangement as to partial days not being reckoned as full days is explicable only in the view that the days before the 5th (during which there was no discharge whatever) were to be struck out altogether, so as to make the 5th the first lay-day. This point

was not argued by counsel, who assumed that it was a question of all or none.

As against such demurrage, the defendant is fairly entitled to credit for half a day on the 13th, as on that occasion I think the gangs on board would not, in any circumstances, have worked. I decide this on the assumption that the strike clause applies to the contractual period allowed for demurrage. With regard to the special defences as to portions of days not being reckoned as full days, I have incidentally dealt with it above. The plaintiffs' concession was expressly limited to the past, and cannot be enlarged to embrace the whole period of delivery—the future as well as the past. The repeated demurrage notes exclude any possibility of misunderstanding. The defendant is bound by the terms of the telegram, which he accepted without objection.

This brings me to the last point in the case, on which, if the defendant succeeds, the action fails, and must be dismissed with costs. Did the plaintiffs contract on July 24th that the defendant was to be relieved from all demurrage liability beyond three and a half days? At the time the alleged bargain was made the vessel had not arrived; the future was alarming, but quite uncertain. I think neither party knew their exact rights under the charter-party and the operation of the strike clause. The defendant believed—honestly believed—that the strike freed him from liability for demurrage. Did the plaintiff contemplate that if and though the defendant was unprotected by the strike clause, he was to be absolved from all demurrage if he paid three and a half days, and did what he could to expedite delivery?

Ballingall struck me as a rather stolid, unimpulsive man, hardly likely to enter hastily into such an apparently one-sided bargain; the defendant was already bound to do what was reasonably possible, and there is nothing in the proof to indicate that he ever did anything in excess of the duty thrown on him by the charter-party. The defendant's defence rests on his own oral evidence, supported to some extent by Tinsley, Burns's foreman. The plaintiffs' denial is based on his own oral testimony, and that of Captain Hayes and Mr. Hamilton, aided by the correspondence and acts of the parties. Some confusion was caused by the method of cross-examination in Belfast. I think Ballingall

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supposed that the alleged contract was founded on something that took place on August 10th, and he was not asked in detail as to the terms of the conversation of the 24th July. At this distance of time it is difficult to be certain as to sequence, or the words of question and answer; the only thing anyone could be confident about would be the object and result of the interviews. As to the interview of August 7th, Hamilton was not cross-examined about it in Belfast. Hence at the close of the case I allowed Ballingall and Hamilton to be recalled at the end of the defendant's case. Without going into minute details, I am satisfied that the defendant has put a false construction on the conversation, and has mistakenly turned what took place into a contract to forego contractual rights. Mr. Ballingall was not a good witness; he was dull in appearance and manner; he was influenced to some extent by a desire to evade anything that might tell against his case—a remark which, in some degree, applies to the defendant also. On the whole, I accept the version of Ballingall, Hayes, and Hamilton respectively, in preference to that of the defendant and Tinsley. The latter represented Burns, and it is hard to understand why the plaintiff wrote to him as he did, knowing that Tinsley had been present at the interview of the 24th, if there had been any such firm concluded bargain as defendant now states. In the face of the repeated demurrage notes, the defendant only disclaimed liability generally, and made no distinct reference to any contract till August 19th, when in his letter to Messrs. Burns he states that on the first day of discharge he made an arrangement with them, and that the owner had confirmed such arrangement. This letter shows how unreliable is his present professedly accurate recollection of these conversations with question and answer. With the facts fresher in his mind he puts the initial bargain on the first day of discharge, which would be the 5th August, whereas the contract of the 24th July was before the vessel had arrived. The primary bargain is stated to have been with Burns, and to have been confirmed by the plaintiff. Of such initial bargain there is no trace in the evidence. Why does not the writer appeal to his correspondent's own representative, Tinsley, who was present at the alleged bargain of the 24th?

He speaks of the confirmation as of something not known to Burns. The interview of the 24th only took a few minutes, and resulted in a letter to Derry which might have solved all difficulty. The conduct of both parties appears quite inconsistent with the supposed contract; see letters of 26th July, Ballingall to Hayes; 27th July, Burns to Ballingall; 31st July, Ballingall to Hayes; 1st August, Hayes to plaintiffs; telegram, 3rd August, plaintiffs to Burns, "without prejudice to all questions on either side"; 6th August, Gallagher to Burns; 6th August, plaintiffs to Burns; 6th August, plaintiffs to Hayes; 7th August, telegram; 7th August, notice of demurrage; 7th August, Hamilton to plaintiffs; 7th August, plaintiffs to Hamilton; 8th August, plaintiffs to Burns; 8th August, Burns to Gallagher; 8th August, plaintiffs to Burns; 10th August; 12th August; defendant's letter of 19th. Mr. M'Grath, for the defendant, suggested that in writing to Burns on August 6th, as he did, the defendant's object was to spur Burns to exertion as, if he had stated his bargain with Ballingall, Burns might have relaxed his efforts. But Tinsley knew all about the alleged contract, and the defendant's letter of 19th August entirely disposes of the suggested explanation. I find it impossible to reconcile these letters with such a contract as is now relied on—a contract that, even if the defendant was not protected by the strike clause, the plaintiff was to release the defendant from all demurrage claims beyond three and a half days. The limited concession made as to the two and a half days seems decisive that demurrage *ultra* was not abandoned or released. To prove rescission or variation of a charter-party or any other written business contract, the clearest proof would be necessary. The defendant's counsel suggested that Ballingall was wilfully and knowingly seeking to evade a bargain he had made. On the letters no other course was open. The plaintiffs' counsel made no similar counter-charge. Colouring the past by the present, and misunderstanding his legal rights, the defendant construed what was said in his own interest, and has come to believe that the idea which was behind his own mind was expressed in words and became a contract. Whatever the defendant may have thought, the plaintiffs did not assent to discharge demurrage; they were never *ad idem* with the defendant. The defendant is

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not consciously misrepresenting, but intrinsic probability is strong, and the letters seem to me decisive, against the defendant's version and understanding of the interview. He, no doubt, all through believed that he was protected by the strike clause. I therefore find for the plaintiffs for demurrage, as claimed in the notice of August 17th, from August 8th to August 17th, inclusive, less half a day on 13th, making altogether £435 2*s.*, and give judgment for that amount with costs. The amount lodged in Court, £160 6*s.* will be paid in part satisfaction. The costs will include the shorthand writer and his notes.

The Judge found for the plaintiffs for demurrage on and from the 8th August to 17th August, 1907, inclusive, as per charter-party, less half a day on 13th August, making together the sum of £435 2*s.*, and gave judgment for the plaintiffs for the sum of £274 6*s.* over and above the sum of £160 6*s.* lodged in Court by the defendant, with costs.

Defendant now moved to have this judgment set aside, or for a new trial, on the grounds that the findings of the learned Judge were wrong in law and contrary to evidence and the weight of evidence, and that the learned Judge misdirected himself in law.

The arguments and authorities cited appear fully from the judgments.

The Rt. Hon. J. H. Campbell, K.C., Ronan, K.C., M'Grath, K.C., and *Hanna*, for the defendant.

Gordon, K.C., Chambers, K.C., M'Gonigal, and *Fitz Stephen Burke*, for the plaintiffs.

Cur. adv. vult.

1911. Feb. 3.

MADDEN, J.:—

The plaintiffs in this action are the owners of the steamship Langham, in which certain goods were carried from Selina to the Port of Belfast under a bill of lading of which the defendant was assignee. By the terms of the charter-party, which were

incorporated with the bill of lading, sixteen running days (Sundays and certain holydays excepted) were allowed for loading and unloading, and ten days on demurrage at a certain rate per running day calculated on the tonnage. The charter-party contained the following clause: "If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this charter if, by the use of reasonable diligence, he could have obtained other suitable labour; and, in case of any delay by reason of the before-mentioned causes, no claim shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter."

The plaintiffs allege that the goods were carried in their ship from Selina to Belfast, the port of discharge, and there delivered to the defendant, who kept the ship on demurrage for the full period of ten days, from the 1st to the 10th August, at the rate of £45 16*s.* *per diem.*

The ship arrived in Belfast, and was ready for discharge on the 27th July. Discharge commenced on the 5th August and was finished on the 17th. Of the sixteen running days allowed by the charter-party, thirteen and a half days had been spent in loading, leaving only two and a half days for discharge. It was part of the agreement between the vendor and the assignee of the cargo that the latter should have six days for discharge. This agreement did not affect the mutual rights of the shipowner and the charterer or his assignee, and if there were nothing more in the case, the plaintiffs would clearly be entitled to claim for demurrage. No question has been argued before us as to the amount allowed by the learned Judge. As against the claim of the shipowner, the defendant relies on the following defences, each going to the entire right of action. First, he relies on the clause of the charter which I have quoted, alleging that the delay was caused by a strike of workmen essential to the discharge of the cargo; and, secondly, he alleges an agreement between the plaintiffs and the defendant that, in consideration of the defen-

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dant making special efforts and arrangements for the discharge of the cargo during the continuance of the strike, the demurrage should be calculated at three and a half days only, and they bring into Court an amount for demurrage calculated on this basis.

There is no substantial controversy as to the condition of affairs at the Port of Belfast when the Langham arrived on the 27th July. A strike of carters had been for some days in progress, which did not terminate until the 16th August. There was no strike of dock labourers. The slackness in working on their part was the result of there being little work for them to do; and, when the carters' strike was over, the vessel was rapidly discharged. The cargo of the Langham consisted of grain in bulk. It was found as a matter of fact that a cargo of this kind when discharged over the ship's rail to the quay in sacks is customarily disposed of as follows :—

(1) It may be conveyed to its destination on carts; (2) stored in sheds; or (3) "slabbed" on the quay. The last-mentioned mode of disposal is under the direction of the quay authority. The harbour-master on the 16th August gave permission for slabbing on the quay to a limited extent, and, as the cargo amounted to about 4000 tons, it is evident that only a small proportion of the cargo could be disposed of, after discharge, in this manner. Another mode of discharge is over the ship's rail into lighters. It is stated that this practice is resorted to only for the purpose of conveying to purchasers grain which had been already sold; this is intelligible, for if a destination was not thus provided for the grain, it would have to be ultimately discharged from the lighters to the quay, and then disposed of by cartage, shedding, or slabbing. Carting was impossible during the continuance of the strike. I am satisfied upon the evidence that there was not sufficient accommodation in the sheds, and that this congested condition was in consequence of the strike of carters. Mr. Justice Gibson was of opinion that at least 400 tons could have been slabbed without obstructing egress or circulation. Even adopting this estimate, the conclusion is irresistible that the cargo, if discharged from the ship's rail on the quay or into lighters, could not have been carried away or disposed of by the consignee. In this state of facts, it was practically impossible for him to accept

discharge of the cargo. I say "practically" for it was physically possible that the sacks should have been delivered over the ship's rail into lighters, regardless of its ultimate destination, or discharged on the quay, and thence dropped into the water. But for all practical purposes there was no alternative open to the consignee of the cargo, other than the detention of the ship to the termination of the strike.

That this view of the position was taken by all parties concerned appears from the correspondence. On the 22nd July, the stevedores (Burns Bros.) wrote to the plaintiffs' agents, "Work in the sheds is now completely stopped, as there is not an inch of spare ground . . . The open quays are similarly situated with timber . . . the carters are on strike, so that conveyance by this means from the ship's side is impossible . . . unless cargo was going overside into lighters or coasting steamers, we may tell you candidly, discharging would be impossible as matters are at present." It appears from a letter written by the defendant on the 24th July that an attempt was made to have the ship discharged in Londonderry, and that the owner was ready to order her from Belfast to Londonderry, on the terms of the charter-party, without any extra freight, "six days to be allowed for discharge." This suggestion could not be carried into effect in consequence of the opposition of the Londonderry dock labourers. The owners' proposal is relied upon as evidence that they did not believe that the expense of detention at Belfast by reason of the strike would fall on the consignees. I do not take this view of the correspondence. Both parties were involved in a common difficulty, and it was in the interest of both to avoid the risk of detention at Belfast for an indefinite period, by which the ship might be prevented from fulfilling engagements elsewhere. However this may be, the view of their rights under the charter-party taken by the owners of the ship could not affect the construction of this document, although it would be a matter to be taken into account in considering the evidence relating to the special agreement alleged by the defence.

I now proceed to consider the terms of the charter-party, and their application to the state of facts disclosed by the evidence. Sixteen running days are to be allowed "for loading and unloading."

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"Unloading" and "discharge" are, in this document, convertible terms. This appears from the use of the phrase "port of loading" in paragraph 1, and "port of discharge" in paragraph 10, as denoting the port where the vessel is to be unloaded. If there were nothing more in the charter, the contract to pay demurrage would be an absolute one. The nature and effect of such a contract are clearly pointed out by Lord Esher in *Budgett & Co.* v. *Binnington & Co.* (1). "It has been held that the demurrage contract, where a fixed number of lay days is mentioned, is a contract by the freighter, that, if the ship is detained over those days, he will pay demurrage for so long as the ship is in such a condition that she cannot be handed back for the use of the shipper. This has been called an absolute and independent contract, and it is obvious that a contrast is intended to be drawn between such a contract and a conditional one, and that by an absolute contract is meant an unconditional one. The only condition attached to it is, that lay days shall have commenced and run out, and that condition being fulfilled the obligation arises. Directly the shipowner shows this state of facts, he has proved his case, and it lies on the other side to show, not that there has been no breach of contract, but that he is excused from the performance—in other words, his case is one of confession and avoidance, and the whole burden of proof is on him."

If the shipowner were by any act of his own, or one for which he was responsible, to prevent the discharge, the charterer or consignee would be excused on the general principle that a breach of contract is excused when the party committing the breach has been prevented from carrying out his contract by the other party to it. But where the non-performance of his part of the contract by the shipowner is the consequence of the acts of persons over whom he has no control, as, for example, a strike of dock labourers, this principle does not apply, and the contract to pay demurrage being absolute and unconditional, must be performed by the consignee of the cargo.

It is, of course, open to the parties to a contract for demurrage

(1) [1891]1 Q. B., at p. 37.

to import into the contract such express conditions and exceptions as they think proper. In the present case an exception has been inserted in the charter-party, which would have excused the consignee if it had been present in *Budgett* v. *Binnington* (1), and which may have been introduced into contracts of this kind in view of the state of the law as laid down in that case.

Dock labourers are certainly essential to the discharge of the cargo, for it would be impossible without them to carry out the process, as described in the evidence. The question for our decision is, whether carters are essential to the discharge of the cargo; or, it may be stated in more general terms, are appliances of any kind, used for the purpose of disposing of the cargo when delivered over the rail of the vessel, essential to the discharge of the cargo, within the meaning of the clause in the charter under consideration.

In order to answer this question, it is necessary to ascertain the precise meaning of the word "discharge" in the charter-party. And here we get assistance from the consideration of the correlative term "loading." Loading and unloading, or discharge, have this in common, that they depend on the joint action of the shipowner and another person. What, then, is this joint action in the case of loading, and how far does it extend? This question was considered by the House of Lords in *Grant & Company* v. *Coverdale* (2). A ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner a complete cargo of bar-iron. There was a fixed number of lay days, and ten days on demurrage over and above. The charter-party contained an exception in the following terms:—"Except in case of hands striking work, or frost or floods, or any other unavoidable accidents preventing the loading or unloading, in which case owners to have the option of employing the steamer in some short-voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship." A substantial portion of the iron, without which a complete cargo could not be loaded, was to be supplied by a firm named Crawshay. When the ship arrived at the East Bute Dock, the Crawshays had their portion of the

(1) [1891] 1 Q. B. 35. (2) 9 A. C. 470.

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cargo ready to be conveyed to the ship and there loaded. It was proved that the only practicable mode of conveying this portion of the cargo from the Crawshays' wharf to the ship as she was lying in the East Bute Dock was in lighters, along a canal which was rendered impassable by ice during the days in question. The East Bute Dock was never frozen over, and the ship would have been loaded with slight delay only, and despatched to sea if the iron could have been conveyed from Crawshays' wharf to the unfrozen dock where the ship lay. The referee, to whom matters of fact had been referred at the trial, found as a fact that the delay in loading was caused by the frost alone. The House of Lords, affirming the decision of the Court of Appeal, held that in this state of facts the case was not taken out of the demurrage clause by the exceptions. "The exception in the contract being limited to 'accidents preventing the loading,' the only question is what is the meaning of 'loading,' and whether this particular frost did in fact prevent the loading. There are two things to be done; the operation of loading is the particular operation in which both parties have to concur. . . . No doubt, for the purpose of loading, the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore, the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation—everything before that is the charterer's part only. It would appear to me to be unreasonable to suppose, unless the words made it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation of loading, which are no part whatever of it, but which belong to that which is exclusively the charterer's business." Lord Selborne would appear from these words to have been

influenced to some extent by the generality of the words in the exception; but it is evident from his judgment that the decision of the House would have been the same if the exception had been limited, as in the present case, to a single cause of delay. This appears even more clearly from the judgments of Lords Bramwell and FitzGerald—"The words, to my mind, are tolerably plain; they relate entirely to something which prevents the loading, that is to say, the actual putting on board of the cargo, and I think when you couple that with the expression in the earlier part of the charter-party, that the vessel is to 'proceed to the East Bute Dock, or so near thereunto as she may safely get, and there load,' the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented" (*per* Lord Bramwell, at page 478). "It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading" (*per* Lord FitzGerald, at page 479).

These conclusions, and the reasoning upon which they are founded, are applicable, *mutatis mutandis*, to the operation of unloading. The operations of loading and unloading have this in common that they are both conducted jointly by the charterer and by the shipowner. The receivers in loading are the shipowner and his servants, and, in unloading, the charterer and his servants. The exception deals in terms with the receiving of the cargo at the port of discharge. It provides that a strike of the receiver's men only shall not exonerate him from demurrage if by the use of reasonable diligence he could have obtained other suitable labour. The sixteen lay days are expressly allowed for the joint operation of "loading and unloading." An exception in any instrument must be read and construed in the light of the provision on which it is engrafted, and the extension, under certain circumstances of the lay days, must be read as referable to the same operations.

The strike in the present case was of a class of labourers who were required not for the unloading of the cargo, but for

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disposing of it after it had been unloaded, and delivered over the rail of the ship. This strike was undoubtedly the cause of the delay in unloading and the consequent detention of the ship, as the frost was the cause of the failure to load in *Grant* v. *Coverdale* (1). The argument addressed to the House of Lords in that case is the same, *mutatis mutandis*, as that which was addressed to us on behalf of the defendant. "The exception," it was said, "applies to all cases in which the loading was directly and in fact prevented by frost, and in which the cargo would in fact have been duly loaded but for the occurrence of such frost." The House of Lords recognized that operations connected with the bringing of the cargo to the ship's side "are so essential to the operation of loading that they are conditions *sine quibus non* of that operation." But they held that everything before the operation of loading is the charterer's part only. On the same principle everything after the operation of unloading is the part of the charterer, and applying to the case of unloading the observations of Lord Selborne, it would be unreasonable, in the absence of express words, to suppose a contract on the part of the shipowner that his ship might be detained for an unlimited time on account of impediments to those things with which he has nothing whatever to do, which follow on the operation of unloading, are no part of it, and belong to that which is exclusively the charterer's business. The decision of the House of Lords in *Postlethwaite* v. *Freeland* (2) was strongly relied on in the able argument addressed to us on behalf of the defendant. The question in that case was a different one from that which we have to decide; there were no fixed lay days, and the question was as to the extent of the obligation cast upon the charterer under the following stipulation:—"The cargo is to be discharged with all dispatch according to the custom of the port," the House of Lords, affirming the decision of the Court of Appeal, held that the obligation under such a contract is fulfilled if the consignee employs all the means and facilities for discharge available at the port. It appears that the result would have been the same in the absence of express reference to the custom of the port. The case is expressly distinguished from one in which lay days are prescribed by the

(1) 9 A. C. 470. (2) 5 A. C. 599.

charter. "For whatever reason the parties who framed the charter-party in this case, and that in the case of *Wright* v. *New Zealand Company* (1), did not choose to have lay days for the discharge of the vessel, and, consequently, it is left to the Court to say what is the contract implied by law" (*per* Lord Blackburn, at page 619). No such question arises when lay days are defined; there is then an express contract, absolute and unconditional as to any question of diligence or available means of discharge. The case of *Postlethwaithe* v. *Freeland* (2) is an authority for the proposition that in considering the question of reasonable dispatch in discharging a cargo the existence of appliances for the purpose of taking the cargo from alongside the ship should be taken into consideration. If the contract in the present case were the same as in *Postlethwaite* v. *Freeland* (2), I should certainly hold that the action for demurrage would not lie, inasmuch as reasonable dispatch had been used by the assignee of the cargo, having regard to the absence of the means customarily available, and used for the purpose of moving the cargo when discharged alongside the ship.

Postlethwaite v. *Freeland* (2) is the leading authority as regards the agreement which is implied on the part of the charterer when no fixed time for unloading is prescribed by the charter to discharge the cargo within a reasonable time. It was followed by a number of cases conversant with an obligation of a similar character, most of which are referred to in the judgment of the Court of Appeal in England in *Lyle Shipping Co.* v. *Cardiff* (3). In that case and in *Good* v. *Isaacs* (4), there were no fixed lay days. We have been referred to passages in the judgments in several of these cases. But it will be found, on examination, that the observations which were relied on were directed to an implied contract such as I have referred to, and that they are inapplicable to an absolute and unconditional agreement to discharge within a definite limit of time. Nor do they afford any assistance in construing an exception such as that which exists in the present case. In cases of this kind the Courts had to consider what was

(1) 4 Ex. Div. 165.
(2) 5 A. C. 599.
(3) [1900] 2 Q. B. 638.
(4) [1892] 2 Q. B. 555.

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practically possible, not whether an absolute undertaking had been violated. In *Ford* v. *Cotesworth* (1) the discharge of the goods was rendered practically impossible by an order of the authorities of the port. Kelly, C.B., says, "Although it might not have been rendered physically impossible to put the goods over the side of the ship, yet the whole process of landing was prevented by a cause over which neither party had any control." Mr. Ronan quoted the following passage from the judgment of Lord Blackburn in *Sheppard* v. *Henderson* (2), in which, adopting the language of Mr. Justice Maule in *Moss* v. *Smith* (3), he says, "We are dealing with a mercantile matter, we are dealing with mercantile law, and where a thing cannot be practically done in a mercantile contract, we think it cannot be done at all. If you cannot practically get a ship out, it is impossible to get her out." This principle was applied by the Court of Exchequer in *Ford* v. *Cotesworth* (1) to the performance of the implied obligation imposed on a charterer when there are no fixed lay days prescribed. That it is inapplicable to an absolute and unqualified obligation in regard to loading has been decided by the House of Lords in *Grant & Co.* v. *Coverdale* (4), for reasons which, in my opinion, are equally applicable to unloading or discharge. Loading was practically impossible in that case, as in the present instance unloading or discharge was impossible.

The case of *Hulthen* v. *Stewart* (5) before the House of Lords cited on behalf of the defendants is only relevant to the present case in so far as it illustrates the distinction between the absolute and unconditional obligation when fixed days are prescribed, and the implied obligation to discharge within a reasonable time. An attempt was made to read into the charter a limitation of time involving an unconditional liability. This was unsuccessful, for, in the words of Lord Macnaghten, "In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished." It was there found that the

(1) L. R. 5 Q. B. 544.
(2) 7 App. Cas., at p. 69.
(3) 9 C. B. 94.
(4) 9 App. Cas. 470.
(5) [1903] A. C. 389.

charterers had done all they reasonably could to discharge the vessel, and the claim for demurrage was dismissed.

We have been referred to a case decided by the Court of Sessions in Scotland which involved the consideration of an exception to a demurrage clause in a charter-party, similar to that in the present case. The general system of jurisprudence in Scotland differs from ours, but a decision of the Court of Sessions upon the construction of mercantile contract, although not binding on us, is entitled to respectful consideration. There the charter-party, which allowed forty-eight lay days, contained an exemption in very wide terms, "in case of strikes . . . detention by railway or cranes . . . or any other cause beyond the control of the charterers which may impede the ordinary loading and discharge of the vessel." There was evidence that the charterers could not have removed the cargo, which consisted of coal, faster than they did, owing to a railway strike, and they contended, citing *Postlethwaite* v. *Freeland* (1), that their case was covered by the word "strikes" or by the general clause in the charter-party. The Court held that a strike of railway servants was not covered by the exception. The observations of some of the members of the Court are applicable, in principle, to the present case. Lord Young, dealing with the suggestion that it would be unreasonable to say that the charterers should have taken delivery on the quay, though there were no means available for removing the cargo, says, "I should rather have been disposed to say that it was unreasonable to expect the ship to remain till the charterers found means for removing the cargo." Lord Traynor says, "It has not been shown that any of the excepted causes existed which prevented the cargo in question being discharged in the ordinary way, over the ship's side. The owner of the vessel has absolutely no concern with the difficulties which the charterer may have in removing the cargo from the quay on which it has been discharged."

For these reasons I am of opinion that the defendant has failed to bring himself within the terms of the exception on which he relies. It remains to consider his second line of defence: a

(1) 5 A. C. 599.

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contract on the part of the shipowner that, in consideration of the defendant making special efforts and arrangements for the discharge of the cargo during the continuance of the strike, the demurrage should be calculated at three and a half days only. The proof of this alleged agreement rests on oral evidence only. The most that can be said of the lengthy correspondence that is in evidence on behalf of the defendant's case is, that it is not absolutely inconsistent with the existence of such an agreement, although it is difficult to reconcile the existence of such an agreement with the formal notices of demurrage running from day to day that were served on behalf of the shipowner. The burden of proving the alleged agreement rested on the defendant, who was encountered with the extreme improbability that the shipowner exchanged valuable rights for a shadowy undertaking. Mr. Justice Gibson held that no such agreement had been proved. He had the advantage of hearing the examination and cross-examination of the witnesses. A study of the notes of the evidence and of the correspondence has led me to the conclusion at which he arrived.

On this branch of the case, I am satisfied to adopt his conclusion, and the reasoning upon which it is founded.

KENNY, J.:—

It has been settled beyond question that, in the case of a charter-party which provides a distinct time limit for the discharge of the cargo, there is an obligation on the consignee to discharge within that time, no matter what obstacle—other than the Act of God, the King's enemies, or any other specially excepted occurrence—presents itself. The charter-party in the present case is of that character. It provides a certain number of running days for loading and unloading, and thus fixes a distinct period from which the ship is to be on demurrage. If there were no strike clause, no question could possibly arise as to the liability of the consignee for demurrage from the expiration of the running days, provided the ship was ready to carry out its portion of the duty of discharge, and the case could not come into the category of those where the custom of the Port or the reasonableness of the time for discharge entered into consideration. The bargain

between the shipowner and charterer would be regarded as a hard and fast one in which the latter took all the risks for the delay beyond the stipulated free time under any circumstances that were not under the control of the ship. *Budgett* v. *Binnington* (1) is strongly illustrative of a contract where the principle was applied. In such cases as *Ford* v. *Cotesworth* (2), *Postlethwaite* v. *Freeland* (3), *Good* v. *Isaacs* (4), and *Hulthen* v. *Stewart* (5) the contract was an open one in the sense that there was no definite time agreed on for the conclusion of the discharge and the commencement of the liability for demurrage, and the decisions turned on the special facts in relation to custom and reasonable time. No such considerations are applicable in the present case, and the meaning and applicability of the strike clause alone have to be determined.

The clause is a somewhat elaborate one, and it will be remarked that, while it draws a distinction between the ship's men and the consignee's men, it confines its operation most strictly to men engaged in the work of discharge. The exact wording of the clause is important:—

"If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage to which he may be liable under the charter, if, by the use of reasonable diligence, he could have obtained other suitable labour; and, in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter."

The clause applies to the men of both parties—shipowner and consignee—but extends to no class other than those essential to the work of discharge. In my judgment the wording of the clause is quite clear in this respect, and the only subject of con-

(1) [1891] 1 Q. B. 35.
(2) L. R. 5 Q. B. 544.
(3) 5 A. C. 599.
(4) [1892] 2 Q. B. 555.
(5) [1903] A. C. 389.

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troversy possible is the meaning of the word "discharge" in the connexion in which it is here used. The consignee took the risk of a strike or lock-out of men in that category—but, if "discharge," so far as the shipowner is concerned, means delivery of the cargo over the ship's side, it seems to me that the shipowner never took the risk of a lock-out or strike of any section of the community except stevedore's men employed in the actual reception of the cargo from the ship's men. What, then, was within the contemplation of the parties when they used the phrase "essential to the discharge" of the cargo? Is it to be confined to the stevedore's men alone employed in the direct transfer from the ship's side, or is it to be extended to a class outside and beyond these—who, though most essential to the removal or disposal of the cargo after receipt by the stevedore's men, were not men employed in the actual receipt and removal of the goods from alongside the ship?

The act of "discharge" is a double or joint one. It necessitates co-operation on the part of the ship and of the receiver of the cargo. The primary obligation of the ship, in the absence of agreement to the contrary, is delivery over the ship's side. That obligation is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side. If there were any doubt about that—the nature of the ship's duty in the present case—it seems to me to be removed by the provision in the charter-party that the cargo is to be "brought and taken from alongside the steamer at freighter's expense and risk." The class to whom it is sought to extend the protection of the clause are carters whose duty it was to remove the cargo after the stevedore's men had taken it from alongside. They are a class who no doubt were essential in the interests of the consignee to the ultimate removal of the cargo from the quay—but how can they be said to be essential to the "discharge" of the cargo from the ship? They were essential to its "disposal," but its transfer from the vessel did not come within their duties, and I find it impossible to enlarge the meaning of the word "discharge" so as to include any acts beyond those of delivery by and receipt from the ship. If the word be capable of greater expansion, the true construction of the charter-party would make

the liability to demurrage conditional not only on there being no strike amongst the stevedore's men—but on there being no delay caused by the action of other more remote parties, such as Railway Companies or lightermen, who could not be regarded as within the control of the shipowner. Furthermore, I am of opinion that the charter-party affords internal evidence that the process of carting was not regarded as the only one capable of being resorted to for the disposal of the cargo. Lighters were within the contemplation of the parties for the purpose of lightening the vessel when necessary, and though their use is only stated to be in connexion with the work of lightening, still they are regarded as a possible means of landing portion of the cargo—and there were no words which would restrict their service to lightening.

I concur therefore in holding that the strike clause does not in the circumstances of the case afford any protection to the consignee or save him from a demurrage claim.

I need only add a few words on the other branch of the defendant's case, which relied on a special contract at the port of discharge that the delay caused by the strike was not to result in a claim for demurrage. Mr. Justice Gibson in his judgment at the trial dealt very exhaustively with the evidence put forward in support of the alleged contract, and he came to the conclusion on the correspondence and the oral evidence that there had never been a concluded bargain for the surrender or abandonment of the plaintiffs' rights. I am of opinion that his finding on this branch of the case is well founded, and that the minds and intentions of the parties were never *ad idem*, and consequently, that the alleged special contract cannot be supported.

WRIGHT, J. :—

By the charter-party in the present case (clause 7) sixteen running days, Sundays, &c., excepted, are to be allowed the freighters for loading and unloading, and ten days on demurrage over and above the said lay days at 4*d.* per ton on the steamer's gross register tonnage per running day.

Apart from the strike clause, there is here an absolute and

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independent contract on the part of the defendant to discharge within a fixed specified number of days, and in default to pay demurrage, unless he can show that he was prevented from discharging within the time allowed for that purpose by the act of the master or those for whom he was responsible: *Budgett* v. *Binnington* (1). To quote shortly from *Postlethwaite* v. *Freeland* (2) at p. 608: "If by the terms of the charter-party he has agreed to discharge within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated."

Clause 13 of the charter-party is in the following words:— "If the cargo cannot be discharged by reason of a strike or look-out of any class of workmen *essential to the discharge of the cargo*, the days for discharging shall not count during the continuance of such strike or lock-out."

The first question, or one of the two questions, raised and argued in the case is, whether on the facts proved and on the proper construction of this clause, the delay in discharging the cargo came within the strike clause, so as to absolve the charterer from damages for the period during which discharge was impossible.

Several modes of discharging or unloading of a cargo were, by the evidence—which seems to me to be on this point rather loose and inexact—stated to be usual and customary in the port of Belfast, I think four in all: discharge into sheds; discharge over board into lighters or barges alongside—this generally applied only to portions of the cargo previously sold; slabbing or dumping the grain on the quay—only a very small portion of this cargo could have been so discharged; and discharge into carts. Several of these modes of unloading or discharging were either physically impossible, or under existing conditions were so inconvenient as to be practically impossible, and the contention of the defendant is, that there remained only one practical method of getting the cargo from the ship, namely, by carriers' carts, and

(1) [1891] 1 Q. B. 35. (2) 5 A. C. 599.

that this was rendered impossible owing to a strike of carters, that this is within clause 13, the "strike" clause, and that he is hereby protected. The evidence proves that there was no strike of dock labourers, with the possible exception of a strike for portion of one day, and the learned Judge has so found. There was slackness among the dock labourers, and they worked badly, but it is certain that they did not strike. The strike which caused the delay and kept the ship idle was a strike of carters, which began on the 4th July, and accordingly was in full operation when defendant bought the cargo on the 15th July, and did not terminate until the 16th August.

The mode of discharging grain is described in the evidence. Tubs are put into the hold, filled there with grain, and hoisted up by the winch; the contents are then canted into the merchant's sacks, the bags are weighed and tied, and taken from the bridge and delivered unto the rail. Carts are largely used for taking the grain away from the ship's side.

Is this cartage, or removal of the grain in carts from the ship's side, part of the unloading or discharging within the meaning of the strike clause in the charter-party?

The learned Judge has left this question undecided. A decision of this question seems to me to be essential. On the other and earlier operation, that of loading, the case of *Grant & Co.* v. *Coverdale, Todd, & Co.* (1) may be usefully referred to. By the charter-party in that case the vessel was to proceed to East Bute Dock, Cardiff, and there load, time to commence from the vessel being ready to load and unload, and ten days on demurrage, over and above the lay days, at £40 per day (except in the case of hands striking, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading).

The ship reached the East Bute Dock, and part of the cargo was loaded; a frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo, which was ready at a wharf on the canal, could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at

(1) 9 A. C. 470.

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any reasonable expense. The dock itself was not frozen over, and if the cargo had been in the dock, the loading might have proceeded. It was argued for the charterers that, the canals being frozen, the frost in fact prevented the loading as much as if the East Bute Dock had been frozen over. The House of Lords unanimously held against that contention. Lord Selborne discusses the meaning of loading, which, he says, is an act in which both parties have to concur.

The shipowner has to do his part, and so must the charterer. "He must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner.... When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading —those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation— everything before that is the charterer's part only" (page 475); and he cites as specially applicable to mercantile cases the maxim *causa proxima non remota spectatur.*

Clause 7 of the charter-party in the present case gives sixteen days for "loading and unloading." Clause 9 declares that the freight is to be paid on "unloading and delivery of the cargo," if in the United Kingdom in cash, &c., and clause 13 ("strike" clause) deals with the case of the discharge of the cargo being prevented by strike or lock-out of workmen essential to the discharge of the cargo. I construe this in exactly the same way as if the word used had been "unload" and not "discharge." Unloading and discharging have, in my opinion, exactly the same meaning.

In *Petersen* v. *Freebody* (1), the charter-party speaks of "loading or discharging," and of the "delivery" of the cargo by the ship, "the ship to discharge over side into lighters or otherwise if required by consignees." Lord Esher, in his judgment, treats discharging the cargo and delivery of the cargo as synonymous. He says that the delivery under the charter-

(1) [1895] 2 Q. B. 294.

party was to be a delivery in the ordinary way by a joint operation in which each was to take his part (pages 297-8); and A. L. Smith, L.J. (at page 300), says that, in ordinary cases of discharging cargo, the ship's crew does the work, until the goods are over the rail, and then the receiver takes his part in the operation.

The taking away of the bags in carts is no part of the unloading or discharging. It is a further stage in the process of bringing the goods to their destination; it is an act of the consignee solely and for his purposes; and while, in a sense, it is a fact that what prevented discharging was the strike of the carters, it was not, in my judgment, the cause within the meaning of the strike clause. The services of carters and carts which, according to the evidence, were at some distance from the ship, only arose after the delivery to the consignee, and when the unloading or discharging had been completed and ended. Accordingly, I am of opinion that the discharge of the cargo was not prevented by a strike of workmen essential to its discharge. As to the second question—this is a question of fact. It is a question which depends on the evidence. I have come to the conclusion on reading the evidence, and on looking at the notes, that the written agreement was not given up. And I may say that upon this matter it would take the very clearest evidence to convince me that the parties abandoned their rights under a written contract, and substituted for that contract a mere parol one.

For all these reasons, I have come to the conclusion that the learned Judge was right in his conclusion, and I see no reason for disturbing it.

Solicitor for plaintiffs: *Martin J. Burke.*
Solicitors for defendant: *Carson & M'Dowell.*

J. M.

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Jan. 12.
Feb. 24.

THE KING (HADE) *v.* JUSTICES OF CARLOW (1).

*Justices—Appointment of Petty Sessions Clerk—*21 & 22 *Vict. c.* 100, *s.* 7—*Qualification of Justices taking part in—"Justices of such Petty Sessions"—Place of meeting.*

The appointment of Petty Sessions Clerk for a district is a ministerial and not a judicial act, and it is not necessary that it should be made in open Court. Any magistrate of the county residing within the Petty Sessions district is entitled to vote at the appointment though he may never before have attended at Petty Sessions.

Motion on behalf of the prosecutor, on notice to the Justices and Clerk of Petty Sessions of the Petty Sessions district of Carlow (by leave of the Court), for an order that a writ of mandamus do issue against the Justices of the Peace of the said district requiring them to elect a Clerk of Petty Sessions for said district in the manner required by law.

The application was founded on the affidavit of the prosecutor, the material statements in which were as follows:—

In June, 1910, a vacancy occurred in the office of Petty Sessions Clerk for the Petty Sessions district of Carlow by the death of James Flewelland, who, up to that time, filled the office.

An election took place on the 17th October, 1910, at 12 o'clock, being the usual hour for holding Petty Sessions at Carlow, there being three candidates, John Reynolds, William Hade (the present prosecutor), and Percy T. Poole.

The election was held in the Bar-room of the Court-house at Carlow. Seventeen magistrates attended. After the polling, the said Percy T. Poole was called into the room and informed by the Chairman that he had been elected. Neither of the other candidates was admitted to the room where the election took place, nor were the public admitted or present.

Some of the magistrates went away, and those who remained attended at the Petty Sessions Court and proceeded with the ordinary business of the Court, but did not make any announce-

(1) Before Lord O'Brien, L.C.J., Palles, C.B., and Wright, J.

ment in open Court that the election had been held, or make any reference whatever to the election.

At the final voting nine magistrates (including Major John Alexander and Mr. Stewart J. C. Duckett) voted for Mr. Poole, and eight voted for the prosecutor (Mr. Hade). As to these gentlemen the prosecutor's affidavit stated as follows :—

"Major Alexander was appointed to the commission of Justice of the Peace on the 28th January, 1891, and I am informed and believe that he has not attended the Petty Sessions for Carlow Petty Sessions district for the past fifteen years, save on the date of the election of Petty Sessions clerk. He has never taken any part in presiding or adjudicating as a Justice of Petty Sessions.

"Mr. Duckett was appointed on the 22nd March, 1882, and I am informed and believe that he has not attended the Petty Sessions for Carlow district in his capacity as Justice of the Peace for over twenty years, save on the date of the election of Petty Sessions Clerk. He has never taken any part in presiding as a Justice at the said Petty Sessions."

The notice published of the election, verified by the affidavit of Mr. Percy T. Poole in resistance to the motion, was as follows :—

"Crown and Peace Office,
"Court House, Carlow,
"*3rd October*, 1910.

"ELECTION OF PETTY SESSIONS CLERK,
"21 & 22 Vict. c. 100. sect. 7.

"Notice is hereby given that the Justices presiding at the Petty Sessions to be held at Carlow on MONDAY, the 17th day of OCTOBER, 1910, will proceed to elect a properly qualified person to the office of PETTY SESSIONS CLERK of said district at a salary of £120 per annum.

[The notice then set out the qualifications and conditions for the office, and was signed by the Clerk of the Crown and Peace.]

The affidavit of Mr. Poole stated that according to his belief copies of the notice were sent by post to all the magistrates who were entitled to receive it; also that Major Alexander and Mr. Duckett permanently reside within the Petty Sessions district of Carlow.

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The Right Hon. Henry Bruen, who was chairman at the election, made an affidavit in which, after stating the receipt by himself of the notice and its publication in the Carlow newspapers of the 8th October, 1910, continued :—

"That in accordance with said notice I attended at the Court-house, Carlow, on Monday, the 17th October, at 12 o'clock noon, being the usual place and time of holding the Petty Sessions for the district of Carlow. There were seventeen magistrates present, and we proceeded to hold the election in accordance with the said notice. I acted as chairman on the occasion, and the election was held in one of the rooms usually used by the magistrates in the Court-house. At the commencement of the proceedings one of the magistrates suggested that the election ought to be held in open Court, but I thereupon expressed my opinion that the words of the 7th section of the Petty Sessions Clerk Act, 21 & 22 Vict. c. 100, did not require that the election should be held in open Court; but that, if the magistrate pressed his suggestion, I would take the opinion of the magistrates present as to whether it was their desire that the election should be held in open Court. The magistrate then withdrew his suggestion, and I mentioned the names of the candidates for the appointment whose written applications were before the magistrates for investigation, and I inquired whether any magistrate wished to propose a candidate for the office. No other candidates were proposed, and I proceeded to take the votes of the magistrates. On the first poll no candidates obtained a clear majority of votes, and a second poll was taken between the candidates who had obtained the greatest number of votes, namely, the said William Hade and the said Percy T. Poole, the result of which poll was that the said Percy T. Poole was declared elected by a majority of one vote. He was immediately called into the room where the magistrates were, and was informed that he had been elected Petty Sessions Clerk for the district of Carlow, subject to the sanction of the Lord Lieutenant. As soon as the election was over the magistrates proceeded with the ordinary business of the Petty Sessions Court."

The affidavit then stated that the appointment of Mr. Poole was provisionally sanctioned by the Lord Lieutenant; and that since the 22nd November, 1910, Mr. Poole had been in office

as Clerk of Petty Sessions, discharging his office in a satisfactory and efficient manner, and continued :—"I am personally aware that Major Alexander and Stewart J. C. Duckett, alleged by the said William Hade to have been disqualified from taking part in the said election of the 17th October, 1910, permanently reside in the said Carlow Petty Sessions district, and that, though they have not been in the habit of attending the said Petty Sessions, they have frequently performed magisterial duties, signing summonses, &c."

Major Alexander's affidavit stated that he was appointed Justice of the Peace on the 28th January, 1891, and that he resides and always resided at Melford House within the Petty Sessions district of Carlow, and has about 1000 acres in the county; that he fully considered Hade's application, and voted for Poole, being in his opinion the best candidate.

As to acting as magistrate for the district the affidavit contained the following statement :—

"I have frequently exercised my functions by signing summonses and affixing my name to documents requiring the signature of a Justice of the Peace, but I have not been in the habit of attending at Petty Sessions for said district, because there has never been any lack of magistrates for the bench there; but in case of there being any need of my services, I was always ready and willing to attend."

Mr. Duckett's affidavit stated that he was appointed Justice of the Peace on the 22nd March, 1882; that he resides and always resided within the Petty Sessions district of Carlow, and owns 1300 acres in various parts of the Petty Sessions District and county of Carlow; that he took affidavits, signed summonses, attested documents, &c., but did not attend Petty Sessions, as there were always magistrates enough on the bench. He was always ready and willing to attend if necessary, but never got any intimation that his attendance was requisite from the resident magistrate or any other magistrate.

Serjeant Moriarty, K.C. (with him *W. J. Johnston*), for the prosecutor :—

The appointment is "the fulfilment of a statutory duty in which the public is interested" : *per* Meredith, M.R., in *R.*

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(*Roycroft*) v. *Justices of Schull, &c., Petty Sessions District* (1). There is no trace in either the Act of 1851 or that of 1858 of any place but the Court-house or other Justice-room being authorized as the place for the discharge of duties to be performed by the Justices as a collective body: see Petty Sessions Act, sect. 1, sect. 8. Sect. 9 (2) merely excludes the access of the public to proceedings of a judicial character in certain cases where the Justices in their discretion may so order.

The Justices of the division have no entity as a collective body except when assembled in the place prescribed by section 8. The room where the Justices sat when making this appointment was not a Court-house or a public Justice-room within the meaning of that section.

Our argument is that the appointment must be made at Petty Sessions—not out of Sessions; and if made in Petty Sessions, it must be made in open Court. In the old Act of 7 & 8 Geo. 4, c. 67, s. 8, this was provided in express words—"The Justices at such Petty Sessions assembled." "Assembled at Petty Sessions" means assembled in the Court-house or known Justice-room where the business of Petty Sessions is transacted. It could not mean a casual meeting in any place the magistrates may select.

As to the second point, neither Major Alexander nor Mr. Duckett was qualified to vote. Neither of them, admittedly, attended Sessions in his life, except when an appointment of some kind was to be made. Summonses are signed by a magistrate not as Justice of any particular district, but as Justice of the county. The same observation applies to taking informations. Residence within the district will not qualify a magistrate who never acts.

W. G. Gibson (with him *Ronan, K.C.*), for Percy T. Poole:—

Residence within the Petty Sessions district is sufficient to entitle a magistrate who is in the Commission of the Peace for the county to vote at the election of a Petty Sessions Clerk for that district: Molloy's Justice of the Peace, 1st ed., p. 404; 2nd ed. (by Hennessy), p. 324, approved of by Wright, J., in *R.* (*Roycroft*) v. *Justices of Schull, &c., Petty Sessions District* (2); Humphrey's

(1) [1910] 2 I R. 601, 617, at p. 619. (2) *Ibid.*, 611, 612.

Justice of the Peace, 9th ed., p. 50. The question appears to have been left open in *R.* (*Fitzgerald*) v. *Justices of Cahirciveen* (1).

As to the other point, the election of a Petty Sessions Clerk is purely an administrative function, and the magistrates were not bound to hold it in open Court. The word "election" is misapplied to the proceeding—it is an appointment of an officer. It is conceivable that in some cases the magistrates, attending and qualified to vote, might *bona fide* consider it most desirable that the discussion of the relative merits of the candidates and the appointment of the successful one should be conducted in private. It is unnecessary to go the length of asserting that the appointment may be made outside the precincts of the Court buildings, but we contend that it need not be made in open Court. [Counsel referred to and commented on the Petty Sessions Act, 1851, sections 8, 9, 12 (1), and to *R.* v. *Woodhouse* (2), and particularly the judgment of Fletcher-Moulton, L.J., at p. 535.]

Ministerial acts done by magistrates are not subject to the strict rules which govern the exercise of their judicial functions: *R.* v. *Inhabitants of Stainforth* (3).

W. J. Johnston, in reply.

LORD O'BRIEN, L.C.J.:— Feb. 24.

There are two questions for our determination in this case. The first, the principal question, is, whether in the appointment of a Petty Sessions Clerk the magistrates who appoint should sit in open Court for the purposes of the appointment; whether, in fact, the appointment should be made in open Court. Secondly, whether the magistrates who, in this particular case, purported to appoint were qualified to do so. These are the two questions for our determination. The first question, as to whether the appointing magistrates should sit in open Court, is I might say bare of authority; we must determine it by whatever light the nature of the act itself—the act of appointment—and the relevant statutes, the 21 & 22 Vict. c. 100, and the Petty Sessions Act, afford us. What then is the nature—the quality—of the act of appointment? It is plain it is not a judicial act. It does not determine rights; it does not redress wrongs. It is not a "*lis*." It is not a charge.

(1) 44 Ir. L. T. R. 252. (2) [1906] 2 K. B. 501. (3) 11 Q. B. 66.

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It is not a complaint. It is simply what it purports to be—a mere appointment. If authority were wanting to show that the act of appointing is not a judicial function, I might refer to *Rex* v. *Drummond* (1). No doubt, as a general rule, in the doing of a judicial act magistrates must sit in open Court: *Daubney* v. *Cooper* (2); but the act of appointment, with which we are dealing here is, as I have said, in no way a judicial act.

Indeed it has not been contended that the act is a judicial act, or in the nature of a judicial act, but it is argued that certain sections of the 21 & 22 Vict. c. 100, and of the Petty Sessions Act, determine the matter; that it is clear, it is alleged, that having regard to the provisions of these Acts, the magistrates must appoint in Petty Sessions, and that that obligation necessarily involves that they must sit in open Court. The 6th and 7th sections of the 21 & 22 Vict. c. 100, have been referred to, and, mainly and principally, section 8 of the Petty Sessions Act. No doubt, section 6 of the 21 & 22 Vict. c. 100, which provides for the appointment of one clerk in respect of several Petty Sessions Districts, uses the words, *the Justices assembled at Quarter Sessions*; and no doubt, too, the 7th section of the same Act, dealing with the appointment of a Petty Sessions Clerk, provides in so many words that as often as a vacancy shall arise in the office of Petty Sessions Clerk serving one district only (which is the present case) the Justices of such Petty Sessions shall nominate and appoint some proper person to fill the said office. These words indicate that the appointment must be made in Petty Sessions, but this fact does not advance us on the road to a solution of the question we have to determine, because Petty Sessions may be held in a place from which the public are shut out as well as in open Court; and the sections which provide that certain summary matters shall be dealt with in open Court do not throw very much light on the question. Of the two, I think that express provisions as to the obligation to sit in some instances in open Court, such as section 9 of the Petty Sessions Act, tend to show that matters which are not expressly provided for may be dealt with in private. Indeed it would appear that the fact that the magistrates must sit in open Court, when the duty to be discharged is a judicial duty, tends

(1) 67 J. P. 300. (2) 10 B. & C. 237.

to show that, when what the magistrates are engaged in doing is not a judicial act, they may sit in private in the absence of a specific and express obligation on the subject. However, the main contention, so much insisted upon by Serjeant Moriarty and Mr. Johnston in their very careful argument, rests upon the 8th section of the Petty Sessions Act. They point out that it is obligatory on the magistrates to appoint a Petty Sessions Clerk, and that it is accordingly a duty they have to discharge; and they contend that all duties must be discharged in the Court-house allocated by section 8 of the Petty Sessions Act for the discharge of those duties. But it appears to me that the section throws no light upon the controversy. The words of the section are:—"The places where Justices shall sit in the discharge of their duties shall be subject to the following provisions:—1. Whenever a public Court-house shall be maintained by county presentment at any place fixed for the holding of Petty Sessions, the Petty Sessions shall be held therein. . ." The section merely provides that the duties shall be discharged in the Court-*house*, but is wholly silent as to any obligation to sit in "*open court*." Every Petty Sessions need not necessarily be held in the so-called "Court," as distinguished from the Court-house. Many circumstances might render it necessary to sit elsewhere than in what is called the Court, in the Court-house; nor, as I have said, does the section in any way provide for sitting in open Court. I am of opinion that the magistrates have an absolute discretion as to whether they will sit in open Court or not. Indeed it might in some cases be a necessary safeguard of decorum in Court that the magistrates on the making of such an appointment should not sit in open Court—doing so might in some cases be attended with unseemly manifestations on the part of those who sympathize with rival candidates. As to the declaration—as to the announcement of the appointment—it must be remembered that the only duty imposed by statute upon the magistrates after the appointment is made, is to communicate the fact of the appointment to the Registrar of Petty Sessions Clerks for the information of the Lord Lieutenant.

So much for the first question we have to determine. As to the second question, I think there is no difficulty: Major Alexander and Mr. Duckett were Justices resident within the Petty Sessions district of Carlow.

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This, in my opinion, is enough to qualify them to vote, even if they never sat at Petty Sessions, or did any act of a magisterial character—though in this case they appear to have done some magisterial acts connected with the Petty Sessions district of Carlow. As to the ascertainment of who the magistrates were who voted, and how they voted, so as to except to them for want of qualification, no practical difficulty exists as to this. Each candidate has his supporters, and as far as I can see, there is no obligation of secrecy. Hitherto, although there has been some little profession of difficulty, the precise position seems to have been accurately ascertained. In the present case no difficulty seems to have existed as to the ascertainment of those who voted, and how they voted.

In this particular case the magistrates sat in private. I think they were entitled so to do; and as none of the magistrates who voted for Mr. Poole was disqualified, he was in my opinion, having a majority of the votes, duly elected and appointed. Accordingly the application for a mandamus must be refused and with costs.

PALLES, C.B.:—

The first question is, whether the appointment of a Petty Sessions Clerk under 21 & 22 Vict. c. 100, sect. 7, must necessarily be made in open Court. I am clearly of opinion that this question should be answered in the negative.

The only class of business which I have ever heard it suggested to be necessary at common law that Justices should hear in open Court is *judicial* business.

No authority has been cited, or, as I believe, exists, for any more extended rule.

The appointment of a Petty Sessions Clerk is eminently a ministerial and not a judicial act; and if authority be required that it is so, it will be found in *Rex* v. *Drummond* (1).

At common law, therefore, there is nothing to prevent such an appointment being made within closed doors.

Serjeant Moriarty, however, principally relies upon statute law as necessitating the appointment being made in open Court.

(1) 67 J. P. 300; 88 L. T. (N. S.) 833.

and the enactment he has pointed to for this purpose is section 8 of the Petty Sessions Act, 1851, 14 & 15 Vict. c. 93.

He relies on this section as showing two things—first, that the appointment must be made at a meeting of the Justices at or in Petty Sessions, whence he jumps to the conclusion that, therefore, it must be so made in open Court; secondly, that it must be made in "a *public* Court" or "a *public* Justice-room."

The answer to both of these arguments is that section 9 of the same Act shows that all proceedings at or in Petty Sessions need not be in open Court.

The obligation imposed by that section of hearing cases in open Court is limited to "cases of summary proceedings," and as such proceedings are necessarily judicial, the statutable rule is co-extensive with that of the common law. As a further answer to the second of these arguments, I have to say that the word "public" in the expression "public Court-house" and "public Justice-room" in section 8 does not mean open to the public, but belonging to or maintained by the public of the county.

The second question is more arguable. It is that two of the Justices were not entitled to vote, because although resident within the Petty Sessions district, and having acted as Justices therein by signing summonses, they did not actually sit at Petty Sessions.

This depends on the meaning of the words "the Justices of such Petty Sessions" in section 7 of 21 & 22 Vict. c. 100. Now, in the subsequent part of that section the appointment of a Petty Sessions Clerk serving "two or more districts" is given to "the Justices of such districts," which, in my judgment, shows that "Justices of such Petty Sessions" in the earlier part of the section mean "Justices of such Petty Sessions *district*."

A Justice resident in and acting as Justice in such Petty Sessions district, in my opinion, answers this description; and I adhere to the opinion that I expressed in *Fitzgerald's Case* (1), and which was in that case joined in by my brothers Gibson and Boyd, that signing and issuing of summonses returnable to the Petty Sessions within the district is acting as a Justice within the district.

The intention of the Legislature in enacting section 7 was, in my opinion, to vest the appointment of the clerk in the persons whom

(1) 44 Ir. L. T. R. 252.

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it would be his duty as clerk to serve and advise; and it is as much the duty of the clerk to frame the summonses which he presents to a Justice for signature, and to advise him thereon, as it is to sit under the Justices at Petty Sessions and to record their proceedings.

In my opinion, the application wholly fails, and should be refused with costs.

WRIGHT, J.:—

I entirely concur in the judgments which have been delivered by the Lord Chief Justice and the Lord Chief Baron, and have only a few words to add.

The duty of appointing a Petty Sessions Clerk is a duty thrown on the Justices of the Petty Sessions district, but both on principle and authority it is a purely administrative act—this is indeed admitted. I agree with the argument put forward by Serjeant Moriarty to this extent, that the duty is one to be performed by the Justices at Petty Sessions, but I see nothing to justify the contention that it must be performed in open Court, and therefore, as regards the first ground relied on, I think that this application fails.

As to the second point, I beg to repeat what I said in *Roycroft's Case* (1), and I go a little further. I agree with my Lord that residence in the Petty Sessions district is enough to qualify a Justice to vote. In the present case the Justices whose votes have been impugned not only reside in the district, but perform duties as Justices of such district. I adopt as a correct statement of the law the passage to be found in Molloy's Justice of the Peace, p. 494:—"Those magistrates only are entitled to vote who reside in the district, or one of the districts, being magistrates of the county in which the district or one of the districts is situated, or who, though not resident in the district or one of the districts, are in the habit of attending and acting as magistrates at the Petty Sessions of the district or one of the districts (2)."

Solicitors for the prosecutor: *Mackey & Connolly.*

Solicitor for Percy T. Poole: *Edward S. Maffett.*

J. G. T.

(1) [1910] 2 I. R. 601, at pp. 611, 612.

(2) Mr. Hade appealed, but when the case appeared in the list for hearing, *W. J. Johnston* announced that Mr. Hade wished no further proceedings to be taken, and the appeal was accordingly struck out with costs.

THE KING (ELIZABETH ROBINSON) *v.* JUSTICES OF LONDONDERRY (1).

K. B. Div. 1911. April 25.

Licensing Acts—Spirit grocer's licence—Renewal certificate—Beer Retailers' and Spirit Grocers' Retail Licences (Ireland) Act, 1900 (63 & 64 *Vict. c.* 30, *sections* 1 *and* 2)—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94, *sect.* 82)—*Application for Justices' certificate at annual licensing sessions—Failure to serve notice of application on police twenty-one days before the annual licensing sessions—Beerhouses (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 35, *sect.* 4)—*Adjournment of application to next Petty Sessions—Licensing Act (Ireland)*, 1874 (37 & 38 *Vict. c.* 69, *sect.* 12, *sub-sect.* 2; *sect.* 37)—*Service of notice on police twenty-one days before the adjourned hearing.*

Section 2 of the Beer Retailers' and Spirit Grocers' Retail Licences (Ireland) Act, 1900 (2), requiring certificates to be granted by Justices in respect of spirit grocers' licences at the annual licensing sessions only, applies only to certificates in respect to new licences, as defined by section 37 of the Licensing Act (Ireland), 1874 (3).

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(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.

(2) Section 1 of this Act (63 & 64 Vict. c. 30) provides:—"Notwithstanding anything in any Act, the licensing Justices shall be at liberty, in their free and unqualified discretion, either to refuse a certificate for any new excise or other licence for sale of beer or spirits by retail to be consumed off the premises, on any grounds appearing to them sufficient, or to grant the same to such persons as they, in the execution of their statutory powers, and in the exercise of their discretion, deem fit and proper, and for the purposes aforesaid shall be at liberty to hear and receive and act upon any objection, and any evidence either in support thereof or in aid of the application, made or tendered by any resident or owner of property in the parish wherein are situate the house and premises in respect of which such certificate is applied for."

Section 2 provides:—"Certificates for any such licences as aforesaid shall, notwithstanding anything in any Act, be granted at annual licensing sessions, and not at any other time."

(3) Section 37 of this Act (37 & 38 Vict. c. 69) provides: "New licence . . . shall mean . . . a licence . . . granted in respect of premises in respect of which a similar licence has not theretofore been granted, or, if granted, has been annulled or has not been in force during the preceding six months."

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Accordingly, where the holder of a spirit grocer's licence applying at the annual licensing sessions, for a certificate of the Justices for a renewal of such licence, omits to serve the full twenty-one days' notice of such application upon the police, as required by sect. 4 of the Beerhouses (Ireland), Act, 1864 (1) (incorporated with the Licensing Act, 1872, by section 82 of the latter Act (2)), the Justices, under sub-section 2 of section 12 of the Licensing Act (Ireland), 1874 (3), may adjourn the application for the certificate for renewal to the next ordinary sessions for the purpose of having the notice served on the police, and if the notice be served on the police twenty-one days before the sessions to which the application is so adjourned, the Justices sitting at such latter sessions may hear and determine the application for the certificate.

MOTION to make absolute a conditional order for a *certiorari* to bring up and quash an order of the Justices sitting in Petty Sessions for the district of Clandy, in the county of Londonderry, on the 7th October, 1910, refusing the application of the prosecutrix for a certificate for the renewal of a spirit grocer's licence, on

(1) Section 4 of this Act (27 & 28 Vict. c. 35) provides :—"Every person who shall apply for such certificate as aforesaid shall give twenty-one days' notice in writing to the sub-inspector of the district in which he resides, or in his absence to the head constable, or, if in the Dublin Metropolitan Police district, to the Superintendent of police of the division in which such person resides, stating the intention of such person to make such application, &c."

(2) Section 82 of this Act (35 & 36 Vict. c. 94) provides :—"It shall not be lawful for any officer of excise in Ireland, . . . to grant to any spirit grocer upon the expiration of his excise licence a renewal of such excise licence, unless such . . . spirit grocer produces a certificate signed by two or more Justices of the Peace, presiding at the Petty Sessions of the district in which such . . . spirit grocer resides, or if in the Dublin Metropolitan Police district by a divisional Justice of the district in which such . . . spirit grocer resides . . . to the peaceable and orderly manner in which his business was conducted . . . during the past year. All applications for such certificates shall be made in the manner and subject to the like conditions as to appeals against the same and otherwise (so far as the same are applicable) as are prescribed by the Beerhouses (Ireland) Act, 1864, in relation to applications for certificates under the said Act."

(3) Sub-section 2 of section 12 of this Act (37 & 38 Vict. c. 69) provides :—"Provided always, that in such cases as may seem fit to such Justices sitting in Petty Sessions . . . a certificate may, notwithstanding the previous provisions, be granted at any time other than that fixed for annual Licensing Petty Sessions, and in like manner as heretofore."

the ground that she had not served the necessary twenty-one days' notice before the annual licensing sessions, held at Clandy on the 2nd of September, 1910, and for a mandamus directing the Justices to hear and determine the application of the prosecutrix for such certificate.

From the affidavit of the prosecutrix, grounding the motion for the conditional order, it appeared that the prosecutrix, for about fourteen years, had held a spirit grocer's licence in respect of premises at Tullintrain, in the Petty Sessions District of Clandy, in the county of Londonderry. At the annual licensing sessions for that district, held at Clandy on the 2nd of September, 1910, the prosecutrix applied for a certificate from the Justices for the renewal of her licence under section 82 of the Licensing Act, 1872 (1). The prosecutrix had overlooked the service of the twenty-one days' notice on the police required by section 4 of the Beerhouses (Ireland) Act, 1864 (2). The Justices adjourned the application to the next ordinary sessions in order to enable prosecutrix to serve the notice upon the District Inspector. On the 5th September, the prosecutrix served the required notice upon Mr. M. Horgan, the District Inspector for the district, and on the 7th October the application for the certificate came before Justices sitting in Petty Sessions for the district of Clandy. Mr. Horgan objected to the application being heard on the ground that the notice served on him by the prosecutrix should have been served twenty-one days before the annual licensing sessions held in the previous September, and the Justices, adopting this contention, refused to hear the prosecutrix.

The conditional order for the *certiorari* was obtained on the 11th February, 1911, on the following grounds:—"That the said Justices were wrong in law in holding that the said twenty-one days' notice must be served before the annual licensing sessions, and that the said order is in excess of jurisdiction, and was founded on no due or legal objection to the granting of the certificate, and is bad on its face."

(1) 35 & 36 Vict. c. 94. (2) 27 & 28 Vict. c. 35.

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Babington, for the prosecutrix :—

The Licensing Act, 1872 (1), incorporates the provisions of the old Beerhouses (Ireland) Act, 1864 (2), as to certificates from the Justices. The Justices had power to adjourn the prosecutrix's application, under section 12 of the Licensing Act (Ireland), 1874 (3). The procedure as to renewals is different from that relative to the grant of new spirit grocers' licences. Where it is sought to obtain the grant of a new licence, the application must be made at the annual licensing sessions (Beer Retailers' and Spirit Grocers' Retail Licences (Ireland) Act, 1900, section 2 (4), but a new licence is a licence for premises which have not been previously licensed. The prosecutrix's application was for a renewal.

The Solicitor-General (*Charles A. O'Connor, K.C.*) and *Linehan*, for the Crown.

Applications such as the present are frequent. This case will settle the effect of the Act of 1900 as to such applications. It has been suggested that section 1 of that Act (4) applies also to new licences, and also that the words "new excise or other licences" cover all applications. I admit that those words govern the whole section. A "new" licence is defined by sect. 37 of the Act of 1874 (3); that definition shows that what the prosecutrix applied for was not a "new" licence. Section 12 of the Act of 1874 (3) would appear to give the Justices power to adjourn such application; that involves that the notice required by the Licensing Act, 1872 (1), and the Beerhouses (Ireland) Act, 1864 (2), can be served for any Petty Sessions.

PALLES, C.B. :—

I am of opinion that the word "new" in 63 & 64 Vict. c. 30, s. 1, governs "other licence for sale of beer or spirits by retail, &c.," as well as "excise licence," and that "new licence" in that section means a "new licence," as defined by the Licensing (Ireland) Act, 1874 (3), *i.e.* "a licence granted in respect of premises in respect of which a similar licence has not been

(1) 35 & 36 Vict. c. 94.
(2) 27 & 28 Vict. c. 35.
(3) 37 & 38 Vict. c. 69.
(4) 63 & 64 Vict. c. 30.

theretofore granted, or, if granted, has been annulled or has not been in force during the preceding six months."

As the licence in the present case is not within that definition, the second section of that Act did not constitute a bar to the Justices granting it.

The next question arises from the proviso in the second subsection of section 12 of the Licensing (Ireland) Act, 1874:— "Provided always, that *in such cases as may seem fit* to such Justices sitting in Petty Sessions, or to such divisional Justice, and in all cases in which a certificate is required from such Justice or Justices for the transfer of a licence, or of an excise licence, a certificate may, notwithstanding the preceding provisions, be granted at any time other than that fixed for the annual Licensing Petty Sessions, and in like manner as heretofore."

I am of opinion—notwithstanding what was said, *arguendo*, in the *Queen* v. *M'Carthy* (1) and the interlocutory observation of Lord Chief Justice Morris—that this section gives an absolute discretion to the Justices, and that their power to grant the certificate on an occasion other than that of the annual Licensing Sessions does not depend on the existence of special circumstances. Consequently, on the 7th of October, being more than twenty-one days after the service of the notice, the Justices had jurisdiction to hear and determine the application. According to their certificate, they appear to have declined jurisdiction, upon the ground that due notice had not been served prior to the September Sessions.

Being of opinion that, notwithstanding the non-service twenty-one days before the September Sessions, the magistrates in October had a discretion as to whether they should grant the certificate, and that they declined to consider whether they would or would not exercise that discretion, their order must be quashed, and a mandamus must issue to them to hear and determine the application.

KENNY and WRIGHT, JJ., concurred.

Solicitor for the prosecutrix: *Frederick G. Dickson.*
Solicitor for the Crown: *Malachy Kelly.*

C. N. K.

(1) 22 L. R. I. 20.

K. B. Div.
1910.
Dec. 7.
1911.
Jan. 17.

Appeal.
1911.
May 5, 8, 18.

ALLMAN & CO. *v.* M'CABE (1).

Landlord and tenant—Overholding—Lease for lives and term of years to commence from the death of the last surviving cestui que vie—*7 Wm. 3, c. 8 (Ir.), ss. 1, 3—"Elsewhere absent themselves in this realm by the space of seven years"—Evidence—Burden of proof.*

By lease dated in 1822 premises in the town of Bandon were demised to C. of Bandon for the lives of D., her son, aged eleven, A., and R., son of F. of Bandon, aged nine, and twenty-one years from the death of the survivor. C.'s interest in the lease vested in the defendant, an auctioneer, who sold the reversion to the plaintiffs under particulars stating that A. was the last life in the lease, and died on 5th February, 1888, and a civil bill ejectment for overholding was brought after February, 1909. On an appeal from a dismiss by the County Court Judge a case was stated by the Judge of Assize. It appeared that A. died on the date stated, but the only other evidence of the expiration of the lease was the evidence of the plaintiffs' foreman, who was born in 1852, and had resided for over forty years in Bandon, and knew the town thoroughly. He merely proved that he never heard of either D. or R. (the two other *cestuis que vie*), "though he had made every inquiry he could."

After the 5th February, 1909, the plaintiffs served notice on the sub-tenants to pay their rents to the plaintiffs, and the defendant served a claim for compensation under the Town Tenants Act.

Held, by Lord O'Brien, L.C.J., in the King's Bench Division, and by the Lord Chancellor and Holmes, L.J. (Palles, C.B., dissenting), in the Court of Appeal, that the statute 7 Wm. 3, c. 8 (Ir.), s. 1, applied to such a lease.

Held, by Palles, C.B., that the impossibility of applying the remedy provided by section 3 to all cases of wrongful evictions of such a lease under the Act showed that section 1 was inapplicable.

Held, also, by the Lord Chancellor, Lord O'Brien, L.C.J., and Holmes, L.J., that the evidence on behalf of the plaintiffs was sufficient to entitle them, under the statute, to a decree for possession, in the absence of evidence on the part of defendant that D. and R., or either of them, survived A. (Gibson, J., dissenting in the King's Bench Division).

Held, by Lord O'Brien, L.C.J., and Boyd, J., that, independently of the statute, the evidence was sufficient to raise the common law presumption that D. and R. died more than twenty-one years before the action was brought.

(1) In the King's Bench Division before Lord O'Brien, L.C.J., and Gibson and Boyd, JJ.

CASE STATED by Cherry, L.J., at the County Cork Summer Assizes, 1910, upon the hearing of an appeal from the dismiss of plaintiffs' civil bill by the County Court Judge of the West Riding. The case was as follows:—

"This was an ejectment to recover possession of premises, 31 Shannon Street, Bandon, held under lease dated 1st March, 1822, from Lord Shannon to Johanna Canniffe of Bandon, for the lives of Daniel Canniffe, son of the lessee, then eleven years of age, Benjamin Thomas, aged fifteen years, Robert Falvey, son of Catherine Falvey of Bandon, aged nine years, and for the term of twenty-one years from the death of the survivor. The lessor's interest became vested in one Swanston, who in 1892 sold the estate he was owner of in Bandon, including these premises, which were described as held under the lease above-mentioned, with a statement that the said Benjamin Thomas was the last life in the lease, and had died on the 5th February, 1888, and that the reversionary term of years was running from that date.

"The defendant at the date of the said sale was tenant under the said lease, and was also the auctioneer who put up the property, including this lot, for sale.

"This lot was not sold at the auction which took place on the 16th August, 1892; but on the 3rd October, 1892, it was sold to the plaintiffs by private sale under the same conditions of sale. The conditions provided that 'the statements in the particulars with respect to the lives in the leases to which these lots are stated to be subject are believed to be correct, but the vendor does not in any way guarantee the correctness of such statements, and purchasers are not to be entitled to any evidence of the existence or non-existence of any of said lives or the dates of the deaths of any of them, or any further information whatsoever with respect to the date of the expiration of any of the said leases, other than that contained in the particulars, and no objection or requisition whatsoever is to be made with respect to the said lives or the terms of the said leases, nor will purchasers be entitled to any compensation in relation to the statements with respect to the tenants' tenure should same be found incorrect.'

"It was proved that the auctioneer read out the conditions of sale at the abortive auction and the tenure of the lots.

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"The only other evidence of the expiration of the lease was that of James O'Donoghue, the plaintiffs' foreman, who stated he had been born in 1852, and had resided for over forty years in Bandon, and knew the town thoroughly. He merely proved that he had never heard of either Daniel Canniffe, son of the lessee, or any Daniel Canniffe, though he had made every inquiry he could. He gave similar evidence in respect of Robert Falvey, son of Catherine Falvey. He knew Benjamin Thomas, and produced a certificate of his death on the 5th February, 1888, at Shannon Street, Bandon.

"If Benjamin Thomas was the last life in the lease, the lease expired on the 5th February, 1909. Subsequent to that date the plaintiffs served notice on the defendant's sub-tenants to pay their rents to the plaintiffs; and the defendant on the 4th March, 1909, served notice claiming compensation under the Town Tenants Act, but withdrew the claim before the hearing.

"I was not satisfied upon the evidence that the three *cestuis que vie* had been proved to be dead; and even if I were bound to presume them dead, I could not see that there was any reason to presume that they had died more than twenty-one years ago. I did not think that the mere fact that the defendant had acted as auctioneer at the abortive sale by auction estopped him from denying that the lease had expired.

"The plaintiffs contended:—First, that the statute 7 Wm. 3 (Ireland), c. 8, applied to the case and that the plaintiffs were entitled to possession; secondly, that, apart from the statute, Daniel Canniffe and Robert Falvey ought to be presumed to have died before Benjamin Thomas; thirdly, that the statement in the rental with reference to his own holding was an admission by the defendant that Benjamin Thomas was the last life in the lease.

"The question for the Court is, whether upon these grounds I was bound to presume that the three *cestuis que vie* named in the lease died more than twenty-one years ago? If the answer to this question be in the affirmative, the dismiss of the County Court Judge should be reversed, and a decree for possession granted to the plaintiffs.

"RICHARD R. CHERRY."

All the documents mentioned in the case were enumerated in the schedule, and were to be deemed incorporated with the case.

The title, preamble, and 1st section of 7 Wm. 3 (Ir.), c. 8, are as follows:—

An Act for Redress of Inconveniencies for want of proof of the deceases of Persons beyond the Seas, or absenting themselves, upon whose lives estates do depend.

"Whereas divers lords of manors and others have used to grant estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives; and it hath often happened that such person or persons, for whose life or lives such estates have been granted, have gone beyond the seas and absented themselves for many years, that the lessors or reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors and reversioners have been held out of possession of their tenements for many years after all the lives upon which such estates depend are dead, in regard that the lessors and the reversioners, when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants (*sic*) when it is impossible for them to discover the same; for remedy of which mischief so frequently happening to such lessors or reversioners, be it enacted, &c. That if such person or persons, for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, their heirs or assigns; the Judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead."

Section 3 is given *in extenso* in the Lord Chief Baron's judgment, *infra*, p. 428.

Norwood (with him, *Conner, K.C.*), for the plaintiffs.

A. M. Sullivan, K.C., and *M'Sweeny*, for the defendant.

Conner, K.C., in reply.

The arguments were substantially the same as at the hearing of the appeal, reported *infra*, pp. 419–422.

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BOYD, J.:—

There cannot be any doubt in this case that the three persons mentioned in the lease of 1st March, 1822, and for whose lives the lease was primarily granted, are now dead, or are not forthcoming, and the only question arising in the case is at what date or dates the law presumes they did die, or absent themselves, so that the lessors or reversioners in the said lease cannot find out whether such person or persons be alive or dead.

In the case of persons of whom no account can be given, the law presumes their death at the expiration of seven years from the time they were last known to be living: *Nepean* v. *Doe* d. *Knight* (1); *Doe* d. *George* v. *Jesson* (2); *Doe* d. *Lloyd* v. *Deakin* (3). In the case of *Doe* v. *Nepean* (4), approved of and followed in *In re Phené's Trusts* (5), it was decided that where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but not that he died at the beginning or end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence. In *Phené's Trusts* (5) this latter fact was material to be proved, but Gifford, L.J., at p. 148, expressly states the principle of the law as I have mentioned, and he refers to the English statute, 19 Ch. 2, c. 6, as supporting his view of the law: see also *Secretary for War* v. *Booth* (6), and judgment of Palles, C.B., end of page 697. This statute is similar to the Irish statute 7 Wm. 3, c. 8, to which I shall refer hereafter.

In the case of *The Prudential Assurance Co.* v. *Edmonds* (7), Lord Blackburn, at page 509, states—"If a man has not been heard of for seven years, that raises the presumption that he is dead," and then goes on to define the meaning of the words "not been heard of," and, referring to the case of *Doe* v. *Andrews* (8), states that it is necessary, in order to raise the presumption, that "there should have been an inquiry and search made for the man

(1) 2 M. & W. 894.
(2) 6 East, 84.
(3) 4 B. & Ald. 433.
(4) 5 B. & Ad. 86.
(5) L. R. 5 Ch. App. 139.
(6) [1901] 2 Ir. R. 692.
(7) 2 App. Cas. 487.
(8) 15 Q. B. 756.

amongst those who, if he was alive, would be likely to hear of him"; and again, "In order to raise the presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or no there has been such an absence of hearing of him as would raise the presumption that he was dead." Once this presumption is established, the onus of proving the contrary is then thrown upon the person who disputes the fact to call evidence to rebut it. Now, what are the facts of the present case. On 1st March, 1822, a lease was granted by Lord Shannon to Johanna Canniffe of Bandon for the lives of Daniel Canniffe, son of the lessee, then eleven years of age; Benjamin Thomas, aged fifteen years; Robert Falvey, son of Catherine Falvey, of Bandon, aged nine years; and for the term of twenty-one years from the death of the survivor. The lessor's interest became vested in one Swanston, who, in 1892, sold the estate to the plaintiffs, and one of the lots on the estate consisted of the premises in respect of which the ejectment in this case was brought. The estate was first put up for sale by auction on 16th August, 1892. The defendant, at the date of the said sale, was the tenant of the premises under the said lease, and was also the auctioneer who put up the property, including this lot, for sale. In the particulars of the property to be sold this lot was described as held under the said lease, with a statement "that the said Benjamin Thomas was the last life in the lease, and had died on the 5th February, 1888, and that the reversionary term of years was running from that date."

The defendant read out the conditions of sale, and the tenure and particulars of the lots at the auction, which auction proved abortive. Although the defendant was the tenant of the lot in dispute, he made no objection to the accuracy of the statement as to Benjamin Thomas being the last life in the lease, or as to the term of years having been running for four years, and it was distinctly a statement adverse to his interests. He was a resident in the town of Bandon, and had as good an opportunity as anyone else of knowing whether the statement was true. On 3rd October, 1892, the property was sold to the plaintiffs by private sale under the same conditions of sale, on the faith of which they bought

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the estate. Acting under the belief that the said lease terminated on 5th February, 1909, that is, twenty-one years after Benjamin Thomas's death, the plaintiffs subsequently thereto served notice upon the defendant's sub-tenants to pay their rents to the plaintiffs, and the defendant on 4th March, 1909, served notice claiming compensation under the Town Tenants Act, his tenancy having expired. The plaintiffs, on 13th March, served notice disputing this claim, and on 3rd April the defendant withdrew the notice before the hearing. When the case came before the County Court Judge, he dismissed it with costs. In my opinion, the service of this notice was an admission by the defendant that the lease had terminated.

The ejectment civil-bill is dated 17th August, 1910, which was dismissed by the County Court Judge, and from this dismiss the plaintiff appealed.

I shall now further refer to the facts in the present case, and also to the evidence given at the hearing.

The death of Benjamin Thomas, one of the lives in the lease of 1822, was proved to have occurred on 5th February, 1888, and the certificate of his death was produced by James O'Donoghue, the foreman of the plaintiffs, who was born in 1852, and had resided in Bandon for forty years. O'Donoghue proved that he had known Benjamin Thomas, who resided at Shannon Street, Bandon, but that he never heard of Daniel Canniffe, another of the lives, or of any Daniel Canniffe, though *he had made every inquiry he could*, and he gave similar evidence as to Robert Falvey, the other life in the lease. Benjamin Thomas, at the time of his death, was eighty-one years of age, and at that date, had they been living, Daniel Canniffe would have been seventy-seven and Robert Falvey seventy-five.

When these persons left Bandon, or under what circumstances they left, or where they went to, does not appear, nor is it alleged that they left any relatives behind them, or any person who knew them, or with whom they were likely to correspond, and as it was unknown whither they had gone, and no information was forthcoming as to where they subsequently resided, there was no possibility of making inquiries elsewhere. For eighteen years before the death of Benjamin Thomas, O'Donoghue had been living in Bandon,

and never heard of them either from Benjamin Thomas, with whom he was acquainted, or anyone else. During these eighteen years O'Donoghue, who was a man in the vigour of life, must have known everyone in a small town like Bandon, and everything about the place. In my opinion, he proved to have exhausted every possible source of inquiry, and he could not have done more; and I think he did everything the law required, and that, according to the law, their deaths must be presumed to have occurred prior to the death of Benjamin Thomas, as stated in the conditions of sale.

In the year 1695 the Irish statute of 7 Wm. 3, c. 8, was passed, and is entitled "An Act for redress of inconveniencies for want of proof of the deceases of persons beyond the seas, or absenting themselves, upon whose lives estates do depend."

The preamble then states—"Whereas divers lords of manors and others have used to grant estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives, and it hath often happened that such person or persons *for whose life or lives estates have been granted* have gone beyond the seas, and absented themselves for many years, that the lessors and reversioners cannot find out whether such persons be alive or dead, by reason whereof such lessors and reversioners have been held out of possession of their tenements for many years after all the lives upon which such estates depend are dead, in regard that the lessors and reversioners when they have brought actions for the recovery of their tenements have been put upon it to prove the death of their tenants when it is almost impossible for them to discover the same"—for remedy of which mischief so frequently happening to such lessors or reversioners it enacts that persons absent seven years shall be deemed dead if no proof given to the contrary.

Section 3 of the Act enacts that if any person be evicted by virtue of the Act, if said persons return or are proved to have been living, the lessee may re-enter and recover possession.

In the case of *Doe* v. *Andrews* (1) the English statute, 19 Ch. 2, c. 6, which is similar to the said Irish statute, is referred to

(1) 15 Q. B. 756.

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without any disapproval of its applicability to the facts of that case. In that case the lease was for lives, and subsequent years, as in this case. The decision was based on the ground that no inquiry had in fact been made as to the existence or non-existence of the lives. It has been argued in this case that the statute does not apply, inasmuch as it only applies to leases for lives and concurrent years, and not to leases, such as the present, for years subsequent to the death of the lives.

It is, however, to be observed that the title of the Act applies to all cases of persons "upon whose lives estates do depend."

The plaintiffs contend that even if the statute does not embrace the entire of the plaintiffs' lease, in this case it does apply to the portion of the lease which is conversant with the lives, and that a lease, such as the present, is in fact two demises; and for this proposition we have been referred to the cases of *Mordant* v. *Wats* (1) and *Jones* v. *Duggan* (2). In these cases it was decided that grants for lives and for years subsequent to the death of the lives are in fact two separate grants, and this principle is recognized in *Duckett* v. *Keene* (3).

Whether the provisions of the statute apply to the present case may be open to doubt, but the title to the Act undoubtedly is sufficiently wide to embrace it, viz., "An Act for redress of inconveniencies for want of proof of the deceases of persons beyond the seas, or absenting themselves, upon whose lives estates do depend."

I do not however, think that the decision in this case depends solely on this point, for, in my opinion, the evidence given by O'Donoghue, and the evidence of the particulars of the property read by the defendant at the auction, without his objecting thereto, and the proceedings adopted by him when his sub-tenants were served with notices to pay their rents to the plaintiffs, convince me that he and everyone about Bandon believed, from their knowledge of the place and circumstances, that Benjamin Thomas was the last surviving life in the lease. We thus have abundant and reliable evidence to convince me that the requirements of the

(1) Brownlow and Goldesborough, 19.

(2) 4 Ir. L. R. 86.

(3) [1903] 1 Ir. R. 409.

law from which the presumption of death anterior to the year 1888 arises have been established. I may remark that it is manifest from the case stated by him that Lord Justice Cherry believed that O'Donoghue was a faith-worthy witness, as, had he thought otherwise, he would not have stated this case. I am of opinion that the question which he has submitted to us should be answered in the affirmative.

GIBSON, J. :—

This case presents several questions of importance. The first is: Does the statute apply to this lease at all? Counsel for the plaintiffs refer to cases deciding that freehold and chattel demises are separate and distinct in legal quality; and no doubt the mischief to be guarded against would appear the same whether the lease was for lives only, or for lives and years. But whether the statute applies depends on its language and context, and there seems to be considerable difficulty in fitting the remedial provisions of section 3 into anything but a lease for lives pure and simple. Suppose that in this case a decree had been given on the basis that the last life had dropped in 1885, and that it was afterwards proved that the life lasted till 1895, the tenant would have been wrongfully ejected, but the statutory remedy given by section 3 would not apply to his case. As I am against the plaintiffs on other grounds, I do not deem it necessary now to decide the point.

Assuming that the lease is within the statute, the next and most important question argued is the meaning of the verb "absent." To get the benefit of the statutory conclusive presumption, the lessor must prove that the persons named as lives remained beyond the seas, or otherwise absented themselves in this realm by the space of seven years together. The word "absent" does not point to absconding or clandestine removal; it merely describes disappearance (the word used in the Scotch Act, 1881, c. 47) from the last place of abode known to the landlord. The residence or locality from which the "absenting" is to take place cannot be restricted to the original residence (if any) described in the demise, for the person might have left it

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and gone to live elsewhere in some place well known to the landlord; it does not denote mere change of abode without more. Take an illustration. Suppose the lives here had gone to settle in Belfast sixty years ago, and their address there was known and ascertained, "absenting" could only be predicated with regard to that newly acquired residence. A purchaser of the reversion years afterwards might not possess the same information. But he cannot in a lease of long duration like the present establish "absenting" by mere proof that the lease describes the locality of the lives (then young boys), and that during a recent period they were unknown in that locality. The absenting must refer to the act of a living person, and to some place of abode at some definite period of time. Here the evidence, at the furthest, only goes back forty years, leaving the intermediate interval from the date of the lease entirely uncovered; and the lives were children whose home under the paternal roof would not be likely to be permanent or durable. A minor can have no residence of his own: *Partridge* v. *Partridge* (1). That a person should not be known of at the address where he lived in early childhood forty years before, is no proof that he was "absenting himself" for the space of seven years together or at all.

The case of *Doe* v. *Andrews* (2) supports my conclusion. The lease was one for lives and years, and counsel cited the English Act in argument. It was reported by Lord Blackburn, who referred to it in *Edmonds' Case* (3). It may be difficult to give the kind of evidence held necessary in that case—but the difficulty might be met by a special covenant, such as that in *Randle* v. *Long* (4). The English statute 6 Anne, c. 18, enabling the reversioner to compel the production of the life, has no counterpart in Ireland. There are several decisions on it, as appears from Woodfall's L. & T., 18th ed., 172; the last is *Re Pople* (5). It is remarkable that in no reported case have the statutes of Charles and of William been sought to be utilized as applied in the same way as has been attempted in this case. In *Nesbitt* v. *M'Manus* (6)

(1) [1894] 1 Ch. 351.
(2) 15 Q. B. 756.
(3) 2 App. Cas., p. 509.
(4) 6 A. & E. 218.
(5) 40 Ch. D. 589.
(6) 3 Ir. C. L. R. 600.

the statute was not relied on at all, whether from oversight (which is unlikely, as it is mentioned in all the text-books), or because it was supposed not to apply to a lease for lives and years, or more probably because it was thought of no practical utility in ascertaining deaths.

In my opinion, "absent" supposes removal from a particular place, at a particular time; the *onus* is on the landlord of proving such "absenting" before he can get the benefit of the statutory presumption; and the present evidence falls short of such proof. Here, when does the term of years begin to run?

A further point was made by Mr. Sullivan that the case raised questions of inference of fact and weight of evidence which could not be the subject of a case stated, as such case must be confined to questions of law. I think that what the case means is, that the Lord Justice held that the plaintiffs' case failed unless they were entitled to a direction on the grounds stated by their counsel, and that our opinion is sought as to the validity of the grounds of direction submitted. I confess I feel great difficulty in confining the question to a mere point of law. Generally the dropping of a life is a question of fact: *Nesbitt* v. *M'Manus* (1), a case like this of lives and years. The fact that O'Donoghue never heard of the lives during the forty years that he knew Bandon is far from conclusive; he was not a relation or a friend; his recent inquiries on the eve of litigation are hardly satisfactory proofs, if they are admissible at all. Taking O'Donoghue's evidence to be true, the plaintiff was not entitled to a direction that the statutory presumption attached; or the Judge was obviously not satisfied as to its weight, if true. In any view the objection remains that the interval from the lease to the time when O'Donoghue's memory begins is left entirely unaccounted for.

Counsel did not argue that, apart from the statute, the death of the *cestuis que vie* had been established. That would be a pure question of fact, as *Nesbitt* v. *M'Manus* (1) shows. *Doe* v. *Deakin* (2) is the strongest case on the subject, but the evidence here falls far short of what there was held sufficient. The difficulty of proving death where family reputation is excluded (*Whittuck* v. *Waters* (3)) is obviously very great.

(1) 3 Ir. C. L. R. 600. (2) 4 B. & Ald. 433. (3) 4 C. & P. 375.

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The complete absence of authority on the statute, now over 200 years old, is a powerful argument against the plaintiffs. Had it been sought to be utilized in the way now attempted, there would be some case on the subject. *Doe* v. *Andrews* (1) suggests that the statute was regarded as of no practical utility; and the statute of 6 Anne, c. 18 (on which there are several decisions), tends to confirm that inference.

I have said nothing as to the auctioneer's statement, as it could at most be evidence, not proof, and cannot have any effect on the operation of the statutory presumption founded on "absenting," which refers to the voluntary act of a living person.

LORD O'BRIEN, L.C.J.:—

I have arrived at the same conclusion as my brother Boyd. I think that the two contentions put forward on behalf of the plaintiffs are well founded; that is to say (1) "That the statute 7 Wm. 3, c. 8 (Ireland), applies to the case, and that the plaintiffs were entitled to possession; (2) that apart from the statute, Daniel Canniffe and Robert Falvey ought to be presumed to have died before Benjamin Thomas." Both of these contentions are, in my opinion, well founded, and each is fatal to the defendants. One, that is the second, is conversant with the legal presumption, the presumption in law, arising from seven years' absence; the other, that is to say the first, with the statutory presumption. I shall in the first place deal with the second contention, conversant with the legal presumption, the presumption of law, as distinguished from the statutory presumption.

The principal, the most authoritative, case on the subject is *In re Phené's Trusts* (2). There it was authoritatively established (see head-note) that if a person has not been heard of for seven years there is a presumption of law that he is dead, but that at what time within that period he died is not a matter of presumption, but of evidence, and that the onus of proving that the death took place at any particular time within the seven years lies upon the

(1) 15 Q. B. 756. (2) L. R. 5 Ch. App. 139.

persons who claim a right, to the establishment of which that fact is essential. See also *R.* v. *Lumley* (1) and *In re Lewes's Trusts* (2), referred to in Best on Evidence, par. 409, p. 525, in the 6th Ed.; see also 8th Ed., p. 367.

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This is the law. What are the facts? It has been proved by direct evidence that Benjamin Thomas, one of the lives in the lease, died on the 5th February, 1888. A certificate of his death was produced. As to the other two lives, Daniel Canniffe and Robert Falvey, James O'Donoghue proved that they had been absent from Bandon and had not been heard of for eighteen years at least before the 5th February, 1888, nor had they been heard of since that date, and therefore should be presumed to be dead before Benjamin Thomas died on the 5th February, 1888. O'Donoghue states that he made every inquiry he could for them, but as to the precise character of the inquiries he was not cross-examined. Lord Justice Cherry states that, "even if he were bound to presume the lives to be dead, he could not see that there was *any* reason to presume that they had died more than twenty-one years ago." Was there then any reason to presume that the three *cestuis que vie* had died more than twenty-one years ago? My answer to that is, "yes," for two reasons—(*a*) It was proved by direct affirmative evidence that Benjamin Thomas had died on the 5th February, 1888; (*b*) There was evidence that Daniel Canniffe and Robert Falvey had then been absent for more than seven years together from the town of Bandon before the 5th February, 1888, and should, therefore, at that time, in the absence of evidence to the contrary (or that they were alive elsewhere), be presumed to be dead—to have pre-deceased Benjamin Thomas. If this be so, the reversionary term of twenty-one years would have begun to run in 1888, and would have expired before the civil bill ejectment was brought. The plaintiff would therefore be entitled to recover.

Well, how stands the evidence? I shall apply myself to Robert Falvey; to the presumption of death attaching to him—to the presumption that he had died before the 5th February, 1888, the day of the death of Benjamin Thomas. Anything that

(1) L. R. 1 C. C. R. 196. (2) L. R. 6 Ch. App. 356.

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applies to Robert Falvey applies *a fortiori* to Daniel Canniffe, for he was older by two years than Robert Falvey. The latter was nine years of age, the former eleven years of age, on the 1st March, 1822, the date of the original lease. The evidence of James O'Donoghue is equally applicable to both. Now, as to James O'Donoghue I desire to be as precise as I can. His evidence was elaborately treated during the argument. The word "merely" was more than once referred to, but I desire very especially to call attention to Mr. Conner's argument with reference to James O'Donoghue's evidence. He contended, and I think quite rightly, that James O'Donoghue should be taken by us as a truthful witness, and, in particular, he offered to get a statement from Lord Justice Cherry as to whether he considered him a faithworthy witness—"whether he believed him." No member of the Court said he wanted any such statement from Lord Justice Cherry, and the argument proceeded on the basis that James O'Donoghue was a veracious witness, and indeed necessarily so, because his credit was entirely and exclusively for the Lord Justice, and he could not ask us to review what was for him exclusively. The case could not be stated, could not be here, except on the basis that James O'Donoghue should be treated as a credible witness.

Well, what did James O'Donoghue state? This—That he was born in the year 1852, and had resided in Bandon for over forty years, and that he knew the town thoroughly. That he had never heard of Daniel Canniffe, son of the lessee, or any Daniel Canniffe, though he had made every inquiry he could. He gave similar evidence in respect of Robert Falvey, son of Catherine Falvey.

It must, above all matters, be borne in mind that counting the forty years backwards from the time James O'Donoghue gave his evidence, he would have been in Bandon for eighteen years on the 5th February, 1888. This cannot be lost sight of, that on the 5th February, 1888, the day of the death of Benjamin Thomas, he had been in Bandon for eighteen years. Now, then, what is the effect of this? That a credible witness, thoroughly acquainted with the town of Bandon, and resident for over forty years in a comparatively small town, and resident there con-

tinuously for eighteen years before the death of Benjamin Thomas, had never heard during these years of Daniel Canniffe, or Robert Falvey, though he made every inquiry for them. There was, most certainly, evidence sufficient to raise a presumption that the lives were in fact dead before the 5th February, 1888, which would justify a Judge in acting upon it, and which a Judge should, in my opinion, act upon in default of rebutting evidence.

Let me refer to the dates in more detail. The lease was granted in 1822. Robert Falvey was then nine years of age; therefore he was born in 1813, and if alive now would be ninety-eight years of age. Daniel Canniffe would be 100 years of age. Robert Falvey would have been, in 1888, seventy-five years of age, and Daniel Canniffe seventy-seven. Now, James O'Donoghue, who lived in Bandon for more than forty years, would have been, in 1888, thirty-seven years of age, since he was born in 1851; that is to say, he would have been living in Bandon in 1888, and if you count onwards from his birth he would have been then thirty-seven years of age; and if the years are to be counted backwards from the time he gave evidence in 1910, he would have been continuously living in Bandon from the year 1870—for eighteen years before 1888—and, knowing Bandon well, he never knew or heard of any such persons as Robert Falvey and Daniel Canniffe. It should never be forgotten that James O'Donoghue lived in Bandon for eighteen years continuously before the 5th February, 1888, at a time of life when he was most observant, between the age of eighteen and the age of thirty-six, a continuous period of eighteen years. It is my opinion, and I desire to express it as emphatically as I can, that a continual residence of eighteen years in such a small town as Bandon would involve a knowledge not only of the residents but of the very bumps and hollows and stones in the streets of such a town. But he states he made every inquiry he could. What does this involve? This, that though he inquired high and low, up and down, back and forward, no trace could be found or any information afforded as to Canniffe or Falvey. This does not imply that he had been always inquiring for these two men; but it certainly implies that he was doing so for a reasonable time before the litigation arose.

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All this, I think, afforded a presumption that both Daniel Canniffe and Robert Falvey were dead in 1888. I do not say that it proves they died at any particular time preceding 1888, but that they were then dead. If they were then dead, the reversionary lease having since expired by lapse of time, the plaintiff would be entitled to recover the premises by ejectment.

James O'Donoghue, by actual evidence of the death of Benjamin Thomas, and by the presumption of death his evidence affords, established the truth of the statement that Benjamin Thomas was the last life in the lease, that he died on the 5th February, 1888, and that the reversionary term of years was running from that date. I do not go so far as holding that this statement referred to in the second paragraph of the case stated is in itself, *per se*, evidence, no matter how persuasive—how tremendous—its moral force most undoubtedly is. It is a circumstance not to be found in any other case on the subject. In my opinion, James O'Donoghue's evidence *alone* establishes, and ought to be held to establish, the plaintiffs' case, that Canniffe and Falvey had predeceased Benjamin Thomas, and that, accordingly, the plaintiffs should, on the second contention, succeed. I agree with the Lord Justice that the action of the defendant, as auctioneer, though tenant, did not estop him; but I am not to be taken as saying that this was not evidence against him in the nature of an admission; indeed I think it was.

But now take the first contention, involving the construction, scope, and applicability of 7 Wm. 3, c. 8 (Ireland). The object of the Act is stated in its preamble, and as my brother Boyd has read the preamble, I need not read it again. It is plain that the object of the Act was to dispense with the necessity of lessors and reversioners proving *affirmatively* that "lives" that had gone beyond the seas, or were absent elsewhere within the realm, had ceased to exist. This is provided for by the first section of the Act of Parliament; and as the question mainly turns on the construction of this section, I shall read it again. After the preamble had stated the mischief to be remedied, the Act runs: "Be it enacted . . . that if such person or persons for whose life or lives such estates have been or shall be granted as aforesaid, shall remain beyond the seas, *or elsewhere absent themselves in this realm*, by the

space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for the recovery of such tenements by the lessors or reversioners, their heirs or assigns, the Judges before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." I refer to the precise language of the section, because it appears to me to be treated in some of the cases in a loose and unsatisfactory way. Reading this section it appears to me that absence beyond the seas, or, what is applicable here, absence elsewhere within this realm, creates a presumption of death, and that the way to rebut that presumption is to adduce sufficient and evident proof of the lives: there is in this case no such proof; it is not pretended that there is. In support of this view I must refer to *Rowe* v. *Hasland* (1). Lord Mansfield, in his judgment in that case, is reported to have said:—

"It is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists."

I have already referred to the head-note in *Phené's Trust* (2). I desire to cite a passage from the judgment in that case. It is as follows:—

"The Court is called upon to review the decision of the Court of King's Bench in *Doe* v. *Nepean* (3). The doctrine there laid down is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct."

(1) 1 Sir W. Blackstone's Reports, p. 404.

(2) L. R. 5 Ch. App., p. 148.

(3) 5 B. & Ad. 86.

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This is the passage to which I referred; and in connexion with the case of *Phené's Trusts* (1) I should like also to cite a passage from the judgment of Kekewich, J., in the case of *Wills* v. *Palmer* (2). It is as follows:—

"Mr. Stewart Smith says there is reason to think he is not dead, as it is his interest to conceal himself from both friends and enemies, and therefore his death is not to be presumed. But I do not understand that to be the law: In *Phené's Trusts* (1), Gifford, L.J., in a long and instructive judgment, after having referred to three cases decided by Kindersley, V.-C., says: 'They were all decided on the same general principle that the law presumed a person who has not been heard of for seven years to be dead. You may introduce evidence to rebut that presumption.'" The rebuttable presumption raised by proof of absence becomes absolute when no rebutting evidence is given—and in this case most certainly so, having regard to the position of the defendant as tenant, and his action as auctioneer. Neither the defendant nor anyone else ever produced evidence to rebut the presumption. If the defendant were produced, his cross-examination as to the statement in the rental as to Benjamin Thomas being the last life in the lease, and as to his action as auctioneer, would be very interesting. There is no limitation as to proof of absence; that is to say anyone of the public may prove it. If it were necessary for a plaintiff to produce the relatives of the *cestuis que vie* who were not only absent, but were not heard of, the age of Methuselah would be revived. Anyone that has any experience at Quarter Sessions knows what frauds are attempted; and suppose there were no relatives surviving or to be found, what was to be done? In my opinion, under all the circumstance of the case, the onus of proof had shifted from the plaintiffs to the defendant, and the latter in no way discharged the shifted onus.

But it is argued that the statute of Wm. 3 does not apply to such a case as the one before us, that is to say a lease for lives and a reversionary term of years—a lease for three lives and twenty-one years from the death of the survivor. It is argued that the statute does not embrace such a case as this, because what

(1) L. R. 5 Ch. App., p. 148. (2) 53 W. R., p. 169.

we have here is something more than a lease for lives. It is a lease for lives and a reversionary term of twenty-one years. This appears to me to be not a well-founded objection. It is, I believe, the objection that prevailed with the County Court Judge. But is not the lease a lease for lives, though there may be something added to the lease for lives? The lease for lives has no essential connexion with the term of years. They are in their nature essentially different. They may arise under one contract; but what we have here is a freehold lease and a chattel interest wholly different in their intrinsic nature, the sole connexion between them being that the *terminus a quo* of the chattel interest is the cesser of the last life in the freehold lease. There are, as it were, two grants, one of a freehold interest, the other of a chattel interest. A passage in Brownlow and Goldesborough's Reports supplies an analogy: "If I grant an annuity for life, and twenty years after, *there are two several grants*, and the executor shall have it after the death of the tenant for life": *Mordant* v. *Wats* (1). But take the object of the Act, is not the mischief to be redressed the same, and should we not construe the Act so as to redress the grievance and promote the remedy? I think the construction I attach to the language used is a reasonable one, justified by the language itself and the object of the statute.

It is said that the 3rd section creates some difficulty, that it does not, so to speak, fit such a lease as the present, a lease for lives with a super-added term of years. This argument appears to me to proceed upon the fallacy of treating the grant for lives and years as one single thing—a unit of the same nature throughout—as, so to speak, a single unit, and not regarding the instrument as made up of different parts, different grants, to which different liabilities and remedies attach. To do this is, in my opinion, to ignore the true essential character of the subject-matter, the lease in question—to make it consist of only one part, whereas it plainly consists of two. All rights and grievances up to the moment of the dropping of the last life can be adequately maintained and redressed under section 3, and for matters subsequent the lessee must rely upon the rights and remedies which arise

(1) Brownlow and Goldesborough, 19.

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from his title under the chattel lease. Recovery by the lessor in an ejectment founded on the cesser of the lease for *lives* cannot estop the lessee from claiming under another title, namely, the reversionary term of years.

Lord O'Brien, L.C.J.

I entirely agree with what my brother Gibson says, that the word "absent" in the 1st section does not point to "absconding." I think it means "disappearance," in a case like the present. It is said, however, that we must traverse the whole island, we must perambulate the realm, to locate these two men, Daniel Canniffe and Robert Falvey, to ascertain their home, before we can deal with the question of absence. But Bandon was the place they came from. It was in Bandon their mothers resided; and Bandon was the place from which they had absented themselves: see Best on Evidence, 6th Ed., par. 409, where it is stated that "the same rule holds generally as to persons who are absent from their usual place of resort, and of whom no account can be given."

Again, it is said that they were minors, and that a minor can have no residence of his own. But the Act of Parliament would be deprived of a great part of its utility if minors are to be excluded, since we know that it is the common practice to insert as *cestuis qui vie* in these leases the names of persons under age. If all these suggestions are allowed to prevail, difficulty is mounted on difficulty. Pelion is placed upon Ossa, and a very useful, beneficial Act of Parliament is reduced to a nullity; and its preamble, which plainly contemplates that inconveniences were to be removed, becomes no more nor less than a mere sarcasm.

The case of *Nesbitt* v. *M'Manus* (1) has been referred to. The question there was as to when the tenancy from year to year, arising on the expiration of the lease, commenced. On reading the judgment of that distinguished Judge, Crampton, J., it is clear that that case does not afford any real assistance.

It is said that in *Doe* v. *Andrews* (2) the English statute, 19 Ch. 2, c. 26, was not applied. But I cannot hold that a statute is to be ignored because it is not applied in a certain case; besides, in that case there was no inquiry at all made, and no such evidence as we have here.

(1) 3 Ir. C. L. R. 600. (2) 15 Q. B. 756.

I am accordingly of opinion that on both the grounds I have dealt with, the legal presumption, the presumption in law, and the effect of the statute of Wm. 3, the plaintiffs are entitled to succeed, and that judgment should be entered for them with costs.

Lord O'Brien, L.C.J.

One word in conclusion. In dealing with the case stated, I have done, no doubt, what the Lord Justice wished us to do. I have eliminated personality, mere idiosyncrasy, and have dealt with the case from the point of view of a reasonable man in the abstract, which is, indeed, the only basis on which the case could be stated; and dealing with it on that basis, and as a matter of law, I am of opinion that the questions put to us should be answered in the affirmative.

J. G. T.

Appeal. May 7, 8.

The defendant appealed (1).

G. M'Sweeny (with him *A. M. Sullivan, K.C.*), for the defendant :—

The case turns upon the construction of the Irish statute, 7 Wm. 3, c. 8, corresponding to the English statute 19 Car. 2, c. 6, for the case on behalf of the plaintiffs was sought to be brought within the statute, and their counsel gave no evidence which would warrant the Judge in presuming at common law that all the *cestuis que vie* died more than twenty-one years before action brought. But the statute does not apply at all to a lease like the present, which was a lease for lives, with a superadded term of years, beginning to run from the fall of the last life.

From the title of the Act, and from its preamble, it is plain that the Act deals only with leases for lives, or for years determinable upon lives.

Again, how could the remedy given by section 3 to a lessee who has been evicted by the statutory presumption, if afterwards rebutted by positive evidence of life, be applied to a reversionary term of years. The only remedy given is where one or more of the *cestuis que vie* are proved to be living at the time of the eviction.

(1) In the Court of Appeal, before THE LORD CHANCELLOR, PALLES, C.B., and HOLMES, L.J.

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But that would leave remediless the case where, though all lives had dropped at the time of the eviction, the superadded term of years had not then expired. In such a case the rents and profits during the term could never be recovered under that section.

The inquiry as to the *cestuis que vie* in the present instance was of an insufficient character, and it is plain that the learned Lord Justice who heard the appeal considered it quite unsatisfactory. O'Donoghue, who alone proved any inquiry, was not a member of the family of either Canniffe or Falvey, nor did he get into communication with any member of their families. He himself knew nothing about them. There was no attempt to trace their movements after they left Bandon, or to ascertain whether subsequently they had another established residence. If they had, inquiries should have been made there. To found the presumption of death on a person not being heard of, inquiry must be made amongst the persons who, if he were alive, would be likely to hear of him: *per* Lord Blackburn in *The Prudential Assurance Co.* v. *Edmond* (1). To the same effect is the leading case of *Doe* d. *France* v. *Andrews* (2). That was an ejectment by the reversioner on a lease made in 1801 for three lives and twenty-one years. The action was commenced in 1849, so that it was necessary to establish that the *cestuis que vie* all died before 1828. Patteson, J., said, in the course of the argument—"The mere lapse of time does not raise a presumption of death, unless you go further and show that the person has been absent, and not heard of by those who would have heard of him had he returned." There the only witness called to prove facts which would raise a presumption that one of the *cestuis que vie*, a person named Richard Harrison, was dead, was a cousin who was thirty-eight years of age at the time of the trial, who swore that he never knew of Harrison's existence, and was not aware of having any other relations alive. Wightman, J., at the trial, and the full Court (Patteson, Coleridge, Wightman, and Erle, JJ.), held this to be insufficient evidence of Harrison's death before 1828.

Supposing the defendant were able hereafter to prove that one of the lives was in existence less than twenty-one years ago,

(1) 2 App. Cas. 487, at p. 509. (2) 15 Q. B. 756.

it is plain that he would have no remedy under section 3 of the statute, which would be altogether inapplicable. Nor would he have a remedy by cross-ejectment: *O'Driscoll* v. *Minihan* (1); *Lawrence* v. *Norreys* (2); *Irish Land Commission* v. *Ryan* (3).

Ronan, K.C., Conner, K.C., and *Norwood*, for the plaintiffs:—

O'Driscoll v. *Minihan* (1) was a case in which the King's Bench Division, in exercise of the inherent general jurisdiction of that Court, stayed the proceedings in an ejectment as frivolous and vexatious, on the ground that every question between the parties which could be suggested had been fully tried in a previous ejectment; and this Court held they were right in doing so. Such a case would have no application to an action by a party evicted under the statute of 7 Wm. 3, c. 8, to regain possession, with mesne rates and profits, on the ground that evidence was forthcoming of the existence of one or more of the lives at such a time as would show that the lease had not in fact expired. But as a general rule, and in the absence of special circumstances, a judgment or decree in ejectment is not an estoppel. It only determines title at the time, and is no bar to a subsequent cross-ejectment: *Allen* v. *Derby* (4); *M'Sheffrey* v. *Doherty* (5); see *per* Walker, L.C., p. 216. *The Irish Land Commission* v. *Ryan* (3) does not touch the present question. It was not an action of ejectment, and the only matter discussed was as to how far a judgment by default in an action for a money demand would work an estoppel.

The title of the 7 Wm. 3, c. 8, is in favour of its application to a lease for lives and years. If there be an estate which will come into existence ten years after the death of A. B., that estate depends on A. B.'s life. It may be that section 3 would not apply in the case of the wrongful eviction of such a lease. But the lessee may bring his cross-ejectment independently of the statute. The section might also possibly give a right to re-enter without ejectment. Then, as to inquiry, in *Doe* d. *France* v. *Andrews* (6) no

(1) 43 Ir. L. T. R. 150.
(2) 39 Ch. D. 213.
(3) [1900] 2 I. R. 565.
(4) 16 L. R. I. 346.
(5) [1897] 2 I. R. 191, 210.
(6) 15 Q. B. 756.

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inquiry at all was made. Here O'Donoghue's evidence was uncontradicted, and the Lord Justice accepted it as truthful. The rule is well established that the absence of a person abroad for seven years, without having been heard of, is evidence from which his death may reasonably be presumed, and this presumption was adopted in analogy to 1 Jac. 1., c. 11, relating to bigamy, and 19 Car. 2, c. 6, the English statute corresponding to 7 Wm. 3, c. 8; *Doe* d. *Knight* v. *Nepean* (1); see judgment of Denman, C.J., p. 94; and S. C. in Exch. Ch., 2 M. & W. 894; *In re Phené's Trusts* (2). [The Lord Chancellor referred to *Nesbitt* v. *M'Manus* (3).] We rely on the statute, and when we gave the evidence that Canniffe had absented himself for seven years and upwards, the onus of proving that he was alive at any particular time was shifted to the defendant.

May 18.

THE LORD CHANCELLOR :—

This was a civil-bill ejectment on the title brought to recover the possession of certain premises in Bandon. The County Court Judge dismissed the action, and the plaintiffs appealed to the Judge of Assize. The appeal was heard by Lord Justice Cherry, who stated a case for the opinion of the Court, and from the statements on the case the following facts appear :—

The premises had been held under a lease, dated the 1st March, 1822, made by Lord Shannon to Johanna Canniffe, described as of Bandon, for three lives and twenty-one years from the death of the survivor of the lives.

The lives in the lease are described as Daniel Canniffe, son of the lessee, then eleven years of age, Benjamin Thomas, aged fifteen years, and Robert Falvey, son of Catherine Falvey, of Bandon, aged nine years.

A civil-bill ejectment on the title was brought on the 17th August, 1910, to recover the possession, on the allegation that the lease had determined by the dropping of the lives and the expiration of the reversionary term.

(1) 5 B. & Ad. 86.
(2) L. R. 5 Ch. App. 139.
(3) 3 Ir. C. L. R. 600.

It was proved that Benjamin Thomas, one of the lives, died on the 5th February, 1888, and if the reversionary term then came into existence it expired on the 4th February, 1909; and as regards two of the *cestuis que vie*, Daniel Canniffe and Robert Falvey, it was contended that they must be presumed to have died before the 5th February, 1888, by reason of the provisions of the statute 7 Wm. 3, c. 8 (Ir.).

The plaintiffs bought by private sale on the 3rd October, 1892, and a further question arose in the case as to whether the defendant, who was an auctioneer and had acted as such at an abortive sale by auction on the 16th August, 1892, was not conclusively bound to have admitted by his reading out then conditions of sale, inserted with reference to the dropping of the lives, that the lease had expired. It is not necessary for me to express any opinion on this point, but I am not to be taken as assenting to the correctness of the plaintiffs' contention in regard to it.

The question submitted for our decision is whether upon the evidence the learned Judge was bound to presume that the *cestuis que vie* named in the lease had died more than twenty-one years ago, or, in other words, as Benjamin Thomas was proved to have died on the 5th February, 1888, it should be presumed on the evidence that Daniel Canniffe and Robert Falvey were dead before that date; and the legal question is, whether such a presumption should be made. Only a question of law can be stated, and, therefore, the question is, whether, accepting the lease and the evidence of O'Donoghue, there was a presumption of law that they were dead before the 5th February, 1888.

James O'Donoghue, the foreman of the plaintiffs, swore that he was born in 1852, and resided for over forty years in Bandon, and knew the town thoroughly, and that he never heard of either Daniel Canniffe, one of the *cestuis que vie*, or Robert Falvey, the other *cestuis que vie*, though he made every inquiry he could respecting them. This residence and knowledge extended to a period of eighteen years preceding February, 1888, the date of Benjamin Thomas' death. James O'Donoghue was not cross-examined, and no evidence was given on behalf of the defendants.

The learned Judge states in the case: "I was not satisfied upon the evidence that the three *cestuis que vie* had been proved to

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be dead ; and even if I were bound to presume them to be dead, I could not see that there was any reason to presume that they had died more than twenty-one years ago? If Lord Justice Cherry means that while death at the time of trial or bringing of the action could be presumed, there was no presumption of death at any earlier period, the point was not argued and was only suggested at the close of the case. James O'Donoghue's evidence, if accepted as true, goes to show that the two lives were absent from Bandon thirty-five years, and this, I think, raises the legal presumption that they were dead twenty-seven years ago.

The question seems to me to be not whether there was actual proof of the death of Daniel Canniffe or Robert Falvey, but whether there was a presumption of their deaths, and if so, at what time the presumption came into operation. The main question in the case is the true construction of the Irish statute 7 Wm. 3, c. 8. [His Lordship read the title and preamble of the Act.] I shall leave out section 3 for the present. In the case of continuous absence—disappearance beyond the seas or within the realm—the right of the plaintiffs accrues as if death had taken place at the time when the seven years elapsed.

There is no presumption that the life died at any particular date within the seven years. If that be material, it is a question of fact depending on proof. So far as regards the law, it is conclusively settled by decisions of the Exchequer Chamber and Court of Appeal in England in *In re Phené's Trusts* (1) ; *Nepean* v. *Doe* d. *Knight* (2). In that case the doctrine was laid down in a manner ever since adopted. " Where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years ; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for the purpose beyond the mere lapse of seven years since such person was last heard of. After fully considering the argument at the Bar, we are all of opinion that the doctrine so laid down is correct. It is con-

(1) L. R. 5 Ch. App. 139. (2) 2 M. & W. p. 912, *per* Lord Denman, C.J.

formable to the provisions of the statute 1 Jac. 1, c. 11, relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point to the presumption of the fact of death, but not the time."

In *Lewes's Trusts* (1) Lord Justice Mellish, speaking of the general presumption says:—"If at the end of seven years a person has not been heard of, the presumption is that he is dead, but there is no presumption as to when during the seven years he died." That was a case of a legatee who had not been heard of for more than seven years ending after the testator's death, and the question was, whether the legacy did not fall into the residue by reason of that presumption.

Now, Bandon was the natural place to go to test whether those persons were living. It is described as their home. O'Donoghue knew Bandon all his life. It is a small place, and he swears that for forty years he never knew or heard of them—that he made careful inquiries. He was not cross-examined, and no evidence was given the other way. Surely, then, the presumption arose from their absence from their native and natural residence for such a long period—for more than seven years together. The mischief of the plaintiffs being, in the words of the Act, "put upon it to prove the death of their tenants when it is almost impossible to discover the same" arose. He was there for forty years, and he made every inquiry he could. The two difficulties which were felt by the Lord Justice, first, that they had not been proved to be dead, and, secondly, that there was no reason to presume that they died more than twenty-one years ago, are answered by the statute itself.

The Act does not require that the proof of absence should be given by a relative. On the question before us we must assume O'Donoghue to have been a credible witness, otherwise there could be no question of law to state. If any evidence had been given by the defendant that the lives had left Bandon and gone elsewhere, a question might have arisen which seems to be involved in Mr. Justice Gibson's judgment, and raised the difficulty in his mind. All we know is, that they were for many years not known

(1) L. R. 6 Ch. App. 356.

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in Bandon, and by reason thereof the lessor could not find out whether they were alive or dead, and the mischief under the statute requiring remedy arose.

It was also contended that the statute does not apply at all to the case of a lease for lives with a reversionary term of years to arise at the death of the last life. But such an interest is plainly within the mischief aimed at by the statute, as it is an estate the existence of which depends on lives, and the lessor, in order to recover, is "put upon it to prove the death." A lease for years is within the very words of the statute if it is for years determinable upon one or more life or lives.

If the point were a good one, it could have been raised in *Doe* v. *Andrews* (1), for the Irish Act is identical in terms with the 19 Car. 2, c. 6, and the granting of a new trial shows that more reasonable inquiry would have raised the presumption in a case of lives with a reversionary term of years. I think myself the 3rd section could have been applied, as the assessment of damages for the period the tenant was kept out of his estate will be measured by, and depend upon, the existence of the life presumed to have dropped, but then proved by the tenant in fact to be subsisting. But if the special remedy given by section 3 is inapplicable, it must be remembered that the statute applies to all leases for lives, and the mischief to be remedied exists, and it cannot be restricted because a special remedy given in certain cases is inapplicable, and the common law left to supply the remedy.

As I have said, the case was argued upon the statute of 7 Wm. 3, c. 8, and not on any common law presumption, which was assumed, I think, to arise only where there was evidence that the persons had gone beyond the seas before the seven years began to run. The statute includes persons who elsewhere absent themselves in the realm.

Here the *cestuis qui vie* were inhabitants of Bandon. They were absent from Bandon more than seven years continuously before the 5th February, 1888, and neither from inquiries nor search

(1) 15 Q. B. 756.

was there found any trace that they were present within the realm during the period fixed by the statute.

The case is not by any means free from difficulty, but upon the whole I think the appeal should be dismissed and a decree for possession granted in the terms of the reservation.

PALLES, C.B. :—

I regret to be unable to agree with my learned colleagues. I am of opinion that the question reserved should be answered in the negative.

The main question is that of the construction of the statute 7 Wm. 3, c. 8 (Ireland). Does that statute, or does it not, apply to a lease such as we have here—a lease for lives, with a superadded term of years to commence from the death of the survivor of the lives? I am of opinion that it does not. I agree with the Lord Chief Justice and Mr. Justice Boyd, that such a lease amounts in law to two separate leases: the first a lease for lives *simpliciter*; the second, a reversionary lease for the term of years to commence from the death of the survivor. The estates granted by these two leases do not coalesce. The lands granted by each go, on the death intestate of the tenant, in different directions; that held for the lives, to the special occupant; the reversionary term of years to the personal representative.

It is said that it follows from this that a lease for lives and years is within the preamble of the statute, and therefore within its first section. I do not agree. It shows that such a lease is a lease, not for a life or lives *simpliciter*, but a lease for a life or lives, and something more. Then the mischief recited is, not *simpliciter*, "That the lessors cannot find out whether such persons are alive or dead, by reason whereof such lessors have been held out of possession of their tenements"; but that "they have been so held out of possession *after all the lives upon which such estates depend are dead*"—words which are not applicable where the tenant is entitled to hold possession for a reversionary term, to commence after the deaths of the lives. Further, this limitation is carried into the enacting words of the first section, which, by the use of the words "*such* estates," limits the enactment to leases by which the estates mentioned in the preamble are "used to be

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granted" ; and I rather think that this restriction of the mischief, thus incorporated in the words of the enactment, would be, in itself, and without reference to the third section, sufficient to restrict the operation of section 1, to leases for lives *simpliciter*, without added years.

But the real difficulty arises from section 3 of the statute. That section provides a remedy for a tenant evicted by reason of the statutory presumption being applied to a case in which it is afterwards proved that it was false, by the *cestui que vie* being shown to have been living *at the time of the eviction*. In my opinion, it was intended that the remedy afforded by that section should be applicable to every case within section 1, in which, in event, it was afterwards proved that the statutory presumption was erroneous, and that by reason of the application of such presumption an eviction had taken place before the expiration of the lease.

The words of the third section are :—

"Provided always, and be it enacted, that if any person or persons shall be evicted out of any lands or tenements, by virtue of this Act, and afterwards *if such person or persons upon whose life or lives such estate or estates depend*, shall return again from beyond the seas, or shall on proof, in any action to be brought for the recovery of the same, be made appear *to be living*, or *to have been living at the time of the eviction*, that then and from thenceforth the tenant or lessee who was outed of the same, his or their executors, administrators or assigns, shall or may re-enter, repossess, have, hold, and enjoy the said lands or tenements, as in his or their former estate, *for and during the life or lives*, or so long term as the said person or persons upon whose life or lives the said estate or estates depend, shall be living ; and shall also upon action or actions to be brought by him or them, against the lessors, reversioners, or tenants in possession, or other persons respectively, which since the time of the said eviction received the profits of the said lands or tenements, recover for damages the full profits of the said lands or tenements respectively, with lawful interest, for and from the time that he or they were outed of the said lands or tenements, and kept and held out of the same by the said lessors, reversioners,

tenants, or other persons, who after the said eviction received the profits of the said lands or tenements, or any of them respectively, as well in the case where the said person or persons upon whose life or lives such estate or estates did depend, are or shall be dead at the time of bringing the said action or actions, *as if the said person or persons were then living.*"

This section appears to me to have intended to provide a complete indemnity to a tenant evicted by reason of the statutory presumption, when, in event, that presumption appears to have been contrary to the truth. Thus in this short Act of Parliament we have three definite expressions, one in the preamble, reciting the mischief and carried into the enacting part of the first section, and the remaining two in the section which provides an adequate remedy for the tenant—all of which, in express terms, contemplate that the lease the subject of the action shall be a lease the estate of the tenant under which is determined by the death of the survivor of the *cestuis que vie.* Were a lease for lives *and* years within section 1, the enactment entitling the evicted lessee to re-enter, or to bring an action for the recovery of, the lands, instead of being limited to cases in which it should appear that the *cestui que vie* was living *at the time of the eviction*, should have been, "in case it should appear that *the estates for lives and years* granted by the said lease were subsisting at the time of the eviction"; and the right granted by the statute to the evicted tenant to hold the lands, notwithstanding the previous judgment, should not have been limited in duration, as it is, to the existence of those lives, but should have been for those lives, *and the superadded term of years.*

In construing the Act, we are therefore driven, in my opinion, either to restrict the operation of section 1 to that of section 3, and by reason thereof to hold leases for lives and years not to be within it; or to extend section 3, so as to embrace cases of evictions under leases for lives and years.

Now, the first of these constructions would not restrict the operation of the words of section 1, further than the section itself restricts it, by the use of the words "such estates." It does not require the alteration or omission of a single word in the statute. On the other hand, if by construction we extend the operation of

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section 3, we should necessarily work havoc with its words. We should provide an indemnity for evicted tenants, more extensive than that given by the enactment, and to arise upon events, *inter alia*, not mentioned in it.

There is but one case to be considered: *Doe* d. *France* v. *Andrews* (1).

In it the presumption relied upon at the trial was the ordinary common law presumption of death which arises from a person not having been heard of, and not that arising from absence merely under the English statute 19 Car. 2, c. 6, corresponding to the Irish statute under consideration here. This is apparent from the cases stated in the note to have been cited by Mr. Martin when moving for the rule—*Doe* v. *Jesson* (2), and *Doe* d. *Lloyd* v. *Deakin* (3)—neither of which was a case between landlord and tenant. No doubt in the argument *in banc*, the statute 19 Car. 2, c. 6, was referred to; but in my opinion it is clear, from the consideration of the entire of that case, that it formed no part of the *ratio decidendi* of the Court. I cannot bring myself to believe that, if the Court intended to decide for the first time that the statute extended to a lease which *prima facie* was not within its words, it would not have so stated in express words.

The evidence there was stronger than the evidence here. The question was whether the evidence of the death of a person named Richard Harrison was sufficient to entitle the plaintiff to have the question of his death left to the jury. Some entries in public registers of death, of the death of *a* Richard Harrison, were produced and admitted, but a question arose as to the identity of the Richard Harrison to whom those entries referred with the Richard Harrison, the *cestui que vie* in the lease. No witness was called who had ever known either the *cestui que vie*, or the Richard Harrison to whose death the entries referred. The one witness examined, who was stated to be a member of the family, and who at the time of the trial was about thirty-eight years old, had never known of the existence of his cousin, the lessee, and was not aware of having any relations now living. Upon that

(1) 15 Q. B. 756. (2) 6 East, 80. (3) 4 B. & A. 433.

evidence, the Judge who tried the case, instead of leaving to the jury the question of the common law presumption, non-suited the plaintiff, reserving leave to enter a verdict for him, if there was evidence upon which the jury ought to have acted that the Richard Harrison, the *cestui que vie*, died twenty-one years before the day of the demise—a reservation which would have been the proper one, in the event of that which was relied upon being the common law presumption. Then, upon the argument, Mr. Martin (afterwards Baron Martin), having referred to the statute 19 Car. 2, c. 6, was interrupted by Mr. Justice Patteson: "The mere lapse of time does not raise a presumption of death, unless you go further, and show that the person has been absent, *and not heard of by those who would have heard if he had returned.* The only witness called here was a remote cousin, who had never heard of this man's existence, and who was a boy at the supposed time of his death." Mr. Martin proceeds: "If the man has no relations, and if no one who naturally would have heard of him exists, what can be done? If every man in Liverpool were called as a witness, it would but be accumulating more testimony of the same class as we give." Just as it might be said here, "If every man in Bandon had been called as a witness, it would but be accumulating testimony of the same class as we have given; nothing more can be done." Coleridge, J., answers this by saying: "My doubt is whether there was reasonable evidence of inquiry in this case: either the lessor of the plaintiff might have produced some person who would naturally have heard of the *cestui que vie*, if he was alive, or he might have called those who had made search for such a person and would have found him if he had existed"; and the Court made a rule absolute, not to enter a verdict for the plaintiff, but for a new trial. In my opinion, that decision was no more than that there was a question for the jury in relation to the common law presumption arising from the *cestui que vie* not having been heard of.

The next question is, Was the learned Lord Justice *bound* to presume the death, on the ordinary common law presumption? I am of opinion that he was not. I do not say that upon the evidence he might not have arrived at that conclusion, not as a presumption of law, but as a matter of fact upon the entire

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evidence, including the statement in the rental. But as that statement did not amount to any estoppel, I am of opinion that the learned Lord Justice was not *bound* to make that presumption. Such a presumption does not arise, unless the person in question was not heard of for seven years. Whether he was so heard of is in every case a question of fact. That fact is not found by the Lord Justice; and as acting in this jurisdiction we cannot draw inferences of fact, we cannot assume it unless the evidence is such that that fact is deducible from the evidence as matter of law. In my opinion, no such inference of law arises from the evidence. In determining whether these persons were heard of, the Lord Justice was entitled and bound to consider the character of the inquiry. and the time at which it was made, to bear in mind that no effort was made, either by advertisement or otherwise, to come in touch with any surviving members of the families of those persons, or with those who would naturally be the persons who would have heard of these *cestuis que vie* were they living. I do not say the evidence is not sufficient to establish absence from Bandon; but I am of opinion that the common law presumption of death, although I treat it as a presumption of law, which arises from the fact of the man not having been heard of, involves a consideration of the question of fact—is the Judge satisfied that he was not heard of? and I am of opinion that it was undoubtedly open to the Judge to hold, "I am not satisfied, from the inquiries which have been proved, that he was not heard of"; therefore, I am of opinion that there is no basis upon which we should hold that the learned Lord Justice was bound to make that presumption. I am of opinion that *Doe* v. *Andrews* (1) is a clear authority upon this question in favour of the defendant, because the Court by directing a new trial, instead of entering a verdict, showed that they held that the presumption relied on involved matter of fact; and I also hold that the preamble in the Act of 7 Wm. 3, c. 8, in itself affords authority to the same effect. When that Act was passed, the common law recognized the presumption now so well established; and the statute, in substance, tells us that this presumption was of no avail—"that the lessors cannot find out

(1) 15 Q. B. 756.

whether such persons are alive or dead"; and proceeds to make the presumption depend, not on the negative fact of not being heard of, but on the positive fact of absence.

The third matter relied on is the statement in the rental. I have already said that, had the learned Lord Justice, on this statement, and on the other evidence, found, as a fact, that the two lives in question were dead at the time stated in that rental, I should have held that the evidence warranted such a finding, and that the plaintiff ought to recover. But the statement in that rental is no more than evidence; and *we* are not entitled to take it into consideration, or from it to draw an inference, either of the fact of death, or of the time of it. Although the Lord Justice might have done so, he was not bound to do so; and it is with the latter question only that we have authority to deal.

HOLMES, L.J.:—

If I understand aright the question reserved by Cherry, L.J., for the consideration of the Divisional Court, I have but little difficulty in answering it. The term of the lease of 1st March, 1822, was for the lives of Daniel Canniffe, son of Johanna Canniffe, of Bandon, aged eleven years, Benjamin Thomas, aged fifteen years, and Robert Falvey, son of Catherine Falvey, of Bandon, aged nine years, and for twenty-one years from the death of the survivor. The death of Benjamin Thomas on the 5th February, 1888, was proved by the production of the certificate of his death; and I understand that this is admitted. There was no direct evidence of the deaths of Canniffe and Falvey; and, therefore, it was necessary for the plaintiff to prove facts sufficient to raise the legal presumption that each of them was dead at the date of the death of Thomas. The evidence given for this purpose was—(1) That both of them in 1822 were inhabitants of Bandon; (2), that afterwards, and seven years previous to the 5th February, 1888, they were absent from Bandon; and (3) that neither inquiries nor search have been able to find any trace of them during that period, and down to the present time. The first of these three matters was proved by the lease. The evidence on the second and third was given by James O'Donoghue, who said that he had been

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living in Bandon for the last forty years, beginning with the year in which he was aged eighteen; that during that time he knew the town thoroughly, and that although he recently made every possible inquiry he had never heard of Canniffe or Falvey. Lord Justice Cherry is well aware that when a Judge of Assize states a case for the High Court, he must ascertain the facts which gave rise to a question of law, and that the jurisdiction of the Court is confined to answer the legal question thus raised. I must therefore assume (and in doing so I am satisfied that I am carrying out what was intended by the Lord Justice) that he accepts the evidence afforded by the lease and given by O'Donoghue, and that we are asked to say whether there arises from such evidence a presumption of law that the two men were dead in the year 1888. I cannot agree with counsel for the defendant that there appears in the case stated any doubt of what was deposed to by O'Donoghue. The Judge might have been dissatisfied with his statements, or with the sufficiency of his search; and in either of these cases it would have been his duty to dismiss the civil bill. But he does not say that he was dissatisfied on these points. He says that he was not satisfied upon the evidence that these *cestuis que vie* had been proved to be dead; but there is no room for the legal presumption of death, if there is proof of death as a matter of fact. He adds that even if he were bound to presume them to be dead (that must mean at the time of the trial) he was unable to see that there was any reason to presume that they had died more than twenty-one years ago. This is one of the only two questions of law that arise in the case which I shall now proceed to deal with. In the three Courts which have heard this case, counsel for the plaintiffs have rested their case solely on statute as distinguished from common law, that is to say, on 7 Wm. 3, c. 8. I presume that the reason of their avoiding the common law presumption of the death of a person who has not been heard of for seven years is that it is supposed to be confined to cases where there is evidence that the person had gone beyond seas before that period began to run. As the statute includes persons who elsewhere absent themselves in this realm, the difficulty I have mentioned, if it be a difficulty, is avoided. The defendant's counsel have met the argument based on the statute by boldly asserting that it does not

apply to a case like this where the lease is not only for a term of lives but for a term of years to run from the death of the survivor. The principal if not the only ground for this proposition is that by section 3 where a person presumed to be dead returns to the country, or is proved to have been living at the time of eviction, there is given a remedy which would not be applicable to such a lease as we are now considering. I am unable to accept this construction of the Act. The preamble and the first section apply to all leases for terms of lives, and in my opinion cannot be restricted by reason of the provision of a special remedy inapplicable in certain cases. The only result is that these cases are left to the ample redress existing under the common law. *Doe* v. *Andrews* (1) is not very satisfactorily reported; but the order for a new trial is only consistent with the Court taking this view of the English statute of Charles 2, corresponding to ours of Wm. 3. The second legal question is that to which I presume the Lord Justice refers when he says:—"Even if I were bound to presume them to be dead, I could not see that there was any reason to presume that they had died more than twenty-one years ago." This evidently means that while death at the time of the trial or the bringing of the action could be presumed, there was no presumption of death at an earlier date.

It is strange that this was not argued by the defendant's counsel; but their attention was called to it, and they were heard on it before the case closed. I am of opinion that this question is settled by the mode in which the common law presumption of seven years has always been applied. This doctrine, to quote Lord Denman in *Nepean* v. *Doe* d., *Knight* (2), "is conformable to the provisions of the statute of James 1, relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the fact of *death*, but not at the *time*." These last words must mean (as is now well settled) the fact of death at the end of the seven years, but not at the time within that period at which death occurred. O'Donoghue's evidence, if accepted as true, goes to show that the two men were absent from Bandon

(1) 15 Q. B. 756. (2) 2 M. & W. 894, at p. 912.

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and have not been heard of for the last thirty-five years at least; and as it is not contradicted and no doubt is thrown on it, the presumption arises that the men were dead twenty-seven years ago.

Solicitor for plaintiffs: *J. Travers Wolfe.*
Solicitor for defendant: *P. J. O'Driscoll.*

W. G.

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May 8.

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May 10.

SHARPLES *v.* EASON & SON AND WILKINSON (1).

Practice—Concurrent writ for service out of jurisdiction—Order XI, R. 1 (h)—Action properly brought against person within jurisdiction—Colourable joinder of parties—Abuse of rule of court—Discontinuance of action against the only defendant within the jurisdiction—Stay of proceedings against the remaining defendant—Judicature Act (Ireland), 1877—(40 & 41 Vict. c. 57), sect. 27, sub-sect. (5)—Unconditional appearance.

To justify the exercise of the power to allow service of a writ out of the jurisdiction under Order XI, R. 1 (*h*), the person served within the jurisdiction must be one against whom relief is *bona fide* sought by the plaintiff and not a person, colourably joined for the purpose of effecting service out of the jurisdiction under the Order, against whom the plaintiff has no real cause of action, and against whom the action is discontinued before trial. In a case of colourable joinder, even though an unconditional appearance had been entered by the defendant out of the jurisdiction, the Court, upon discontinuance of the action against the sole defendant within the jurisdiction, stayed all further proceedings in the action on the ground that it was an abuse of the rule.

MOTION to stay proceedings.

The plaintiff issued a writ against the defendants, Eason & Son, within the jurisdiction, claiming damages for an alleged libel contained in a newspaper called the "Racing World." The defendants, Eason & Son, are newsagents, and as such sold the particular issue of the "Racing World" containing the alleged libel, in the ordinary course of their business. The plaintiff having issued the writ aforesaid, applied on the 29th of July, 1910, under Order XI, Rule 1 (*h*), and obtained leave from Ross, J., to issue and

(1) In the King's Bench Division before KENNY and WRIGHT, JJ.

serve a concurrent writ out of the jurisdiction on the defendant, Cuthbert Wilkinson, who resides in London, and is the proprietor and publisher of the "Racing World." The affidavit grounding this application was of a general character, and merely stated that a writ had been issued against Eason & Son of Dublin, that Cuthbert Wilkinson, of London, printed and published the newspaper in which the alleged libel was contained, and that Easons sold the newspaper in Ireland; but it did not allege agency on on the part of Easons in this country for Wilkinson in London. Both defendants duly entered appearances, and filed separate defences, the defence of Easons stating that they were merely sellers of the newspaper in this country, and as such had sold the paper in the ordinary course of their business, without knowledge of its contents, and had been guilty of no negligence in the matter. On the 26th of April, 1911, the plaintiff served notice of trial on the defendant, Wilkinson, and on the same day gave Eason & Son notice of discontinuance of the action against them. The defendant Wilkinson now moved to stay the proceedings in this country on the grounds that—(1) the proceedings were an abuse of the process of the Court; and (2) there was no jurisdiction to try the action, now that Eason & Son were out of the case.

The Right Hon. J. H. Campbell, K.C., and *Chadwick*, for the defendant, Wilkinson.

There is no jurisdiction to try the case in this country now that there has been a discontinuance served on the only defendant within the jurisdiction, for Order XI, Rule 1 (*h*), is one of jurisdiction and not of procedure: *British Wagon Co.* v. *Gray* (1); *Witted* v. *Galbraith* (2). Even admitting that by an appearance a defendant who has been served out of the jurisdiction waives his right to object to any irregularity in the issue of the order, still that act of such a defendant will not confer jurisdiction on the court if the facts do not warrant it; even consent of the parties will not give jurisdiction to the court where the facts do not bring the case within the rule; see the cases in the Annual

(1) [1896] 1 Q. B. 35. (2) [1893] 1 Q. B. 577.

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Practice, cited under the general heading of "Staying Proceedings." Even assuming the Court has jurisdiction to try the action, as at present constituted against Wilkinson, still the proceedings ought to be stayed, as an abuse of the process of the Court; issuing the writ against Easons in Dublin was a transparent device to attract Wilkinson within the jurisdiction. The discontinuance against Easons is an admission that the plaintiff never had any case against them, and never intended to proceed against them: *Ross* v. "*Winning Post*" (1); *FitzGibbon* v. *Eason and Page* (2).

Sergeant Moriarty, *K.C.*, *Chambers*, *K.C.*, and *Coffey*, argued *contra*, and referred to *Preston* v. *Lamont* (3).

Campbell, *K.C.*, in reply cited *Dawson* v. *M'Clelland* (4), and *Clark* v. *Newsam* (5).

KENNY, J.:—

This is an application on behalf of one of the defendants, Mr. Cuthbert Wilkinson, for an order that the action be stayed upon two grounds—(1) abuse of the process of the Court; and (2) want of jurisdiction because of the discontinuance of the action against the only defendant resident within the jurisdiction.

The application is brought under section 27, sub-section 5, of the Judicature Act (Ireland), 1877, and there is no question that under that section we have, in a proper case, jurisdiction to stay proceedings.

The facts are these. The action is one of libel, one of the defendants being Messrs. Eason & Son, Limited, the publishers, of Dublin, and the other being Mr. Cuthbert Wilkinson, who is the proprietor of a racing paper called the "Racing World," published in London. On the 29th of July, 1910, an order was obtained from Mr. Justice Ross, under Order XI, sub-rule (*h*), giving leave to issue and serve a writ out of the jurisdiction, on the defendant, Wilkinson. I have not a copy of the affidavit upon which that order was obtained, but it is not controverted

(1) 45 I. L. T. R. 89; *infra*, p. 459.
(2) Reported in a foot-note to *Ross* v. "*Winning Post*," 45 I. L. T. R., p. 91.
(3) 1 Ex. D. 361.
(4) [1899] 2 I. R. 486.
(5) 1 Ex. 131.

that it was of the most general character, and did not allege agency on the part of Eason, in this country, for Wilkinson in England, but simply stated that Wilkinson was the owner of the newspaper which contained the alleged libel—that Eason published the newspaper in Ireland—and that a writ had already been served on Eason. That order of Ross, J., and the concurrent writ sanctioned by it were duly served on Wilkinson, and he and Eason appeared and filed separate defences. Eason's defence stated that he was merely the seller of the newspaper in this country, and that he was guilty of no negligence in the matter of the publication of the libel. Notice of trial of the action was served on the 26th April, and, contemporaneously therewith, notice of discontinuance of the action as against Eason was also given. The action stands in the list of cases for trial on to-morrow.

No exception has been taken to the order of the 29th July, 1910. Indeed it has been admitted that it was a proper order, and made on proper materials.

Order XI, 1 (*h*), which authorizes service of a concurrent writ out of the jurisdiction, is as follows:—[His Lordship read the rule], and the first contention is, that where there are two defendants, one of whom is resident within the jurisdiction of the Irish Courts, and the other outside that jurisdiction, and the plaintiff discontinues against the former, the action cannot proceed in this country against the latter. That is a very wide proposition, to which I am unable to assent. It involves this, that the action being presumably rightly brought, and rightly continued up to a certain point, the power given by the rules of discontinuing against a defendant, is to be entirely abrogated. I have heard very little argument on this point, and what I have heard has not convinced me that the proposition is one to which effect should be given.

The main argument in support of this application was, however, based on "abuse of the process of the Court." It was said that the circumstances of the discontinuance of the action against Eason demonstrated that the action had not been "properly brought against him" within the meaning of Order XI, 1 (*h*), and that he had been introduced as a defendant for the sole purpose of giving

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an ostensible ground for the exercise of the jurisdiction allowing the issue of the concurrent writ. It is now settled by the case of *Ross* v. "*The Winning Post*" (1) that if the Court be satisfied that the defendant within the jurisdiction was not a proper party to the action, in the sense that the real defendant against whom damages were sought was the defendant out of the jurisdiction, and that the defendant within the jurisdiction has been introduced merely in order to attract jurisdiction, the Court would set aside the order which gave liberty to issue the concurrent writ. That case I take it in effect overrules the decision of Madden, J., and myself in *FitzGibbon* v. *Eason & Co.* (2), where we held that there was no ground for thinking that Eason was a merely nominal defendant. In both these cases Easons were, as now, the defendants against whom it was contended the action had been properly brought in the first instance, and the applications were to set aside the orders for the concurrent writs. In the present case if I were satisfied that this action had been brought against Easons for the mere purpose of attracting the jurisdiction of the Irish Court as against Wilkinson, I would, of course, follow *Ross* v. "*Winning Post*" (1) in holding that the making of Eason a defendant was a mere device, and the obtaining of the order from Ross, J., an abuse of process. But if the proceedings are to be stayed, we ought to have proper materials on affidavit to justify us in doing so. The affidavit in support of the motion merely gives the dates of the proceedings, without a suggestion or charge that there was any impropriety in obtaining the order for the concurrent writ, or, in my opinion, showing any ground for a stay of proceedings. A trick or device to attract jurisdiction is not suggested. I consider that when an order based on "abuse of the process" is asked for, the applicant ought to give the Court more ample materials than have been afforded here for judging whether there has been a trick or device, or other impropriety, and it seems to me that this is very necessary when, as in the present case, neither defendant ever called in question the order of Ross, J., until after the notice of discontinuance was served. Needless to say, I have my suspicions as to the object of making Eason a defendant, but I decline to act in what

(1) 45 I. L. T. R. 89; *infra*, p. 459. (2) 45 Ir. L. T. R., note at page 91.

I regard as the absence of express proof or of circumstances compelling a reasonable inference thereof. My brother Wright takes a different view. He considers there is ample proof of a device. Having regard to the Court being divided, the motion must fail.

WRIGHT, J.:—

In my opinion Mr. Campbell's motion ought to be granted, for the following reasons, shortly stated:—

The affidavit in the present case is a very meagre one, and is made by Mr. Hamilton, a member of the firm of solicitors who are acting for the defendant, Wilkinson. Not only is this affidavit meagre, but further there is no answering affidavit; and, therefore, the Court, in order to come to a decision, has to draw its own inference from the facts of the case itself.

Now, under Order XI, Rule 1, it is, in my opinion, impossible to say that the person out of the jurisdiction in this case has been brought into an action "properly brought against some other person duly served within the jurisdiction," that is to say, an action *bona fide* brought against a person within the jurisdiction. This Order XI was described—I think it was by the Chief Baron—as an international treaty between the Judges of the three kingdoms; the Order applies to everyone in the three kingdoms, and it is perfectly plain that there is no power whatever to bring into the Irish jurisdiction a defendant from England or Scotland, except as provided in the Order.

Sub-section 1, clause (*h*), of this Order provides that service out of the jurisdiction of a writ of summons may be allowed by the Court or a Judge whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." Now, on an affidavit that was obviously imperfect, an order was made by Mr. Justice Ross for service out of the jurisdiction, but any irregularity in that order has been waived on the part of the defendant Wilkinson by entering an appearance, by filing a statement of defence, and by half a dozen other acts; and so far, Mr. Campbell, for the defendant, has no case for the defence whatever. But I now come to other matters. On the 26th

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Wright, J.

April the plaintiff served notice of trial for the present sittings, and the case, as a matter of fact, is in the list for trial on to-morrow. On the same date as he served this notice, he also served notice of discontinuance against Messrs. Eason. It has been said by counsel for the plaintiff, Serjeant Moriarty, that Easons have been settled with (1). But I know nothing of that. All I know is that the action has been withdrawn against Messrs. Eason, and that they are now out of the case. And the plaintiff himself has convinced me as clearly by his acts as if he were sworn, that the only way he had of bringing this foreigner—I may call him a foreigner for the purpose of this proceeding—into this jurisdiction, was by putting Easons into the writ, and that Easons were merely nominal defendants—sham defendants—from the beginning, and that they were in no sense real *bona fide* defendants; that the plaintiff made up his mind to sue them within the jurisdiction for the sole purpose of then serving a writ out of the jurisdiction on Wilkinson, the real *bona fide* defendant, and then discontinuing against Easons.

There was, I am satisfied, jurisdiction to make the order made by Mr. Justice Ross. I am against Mr. Campbell on one ground, but on the other ground I think he is entitled to succeed, namely, that it was an abuse of the process of the Court to join a sham defendant for the purpose—the sole purpose—of getting at a defendant who was otherwise outside the jurisdiction of the Court.

J. M.

Appeal. May 10.

The defendant Wilkinson appealed (2).

The Right Hon. J. H. Campbell, K.C., and *A. M. Sullivan, K.C.* (with them *Chadwick*), for the defendant Wilkinson:—

The affidavit on which the order for service on the defendant Wilkinson out of the jurisdiction was made was insufficient to

(1) This was a statement made in error, and was corrected by Serjeant Moriarty in the Court of Appeal.

(2) In the Court of Appeal before the LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY. The plaintiff accepted short notice of appeal, as the case was in the list for trial.

sustain the application. There is no suggestion that the defendant Eason was an agent for or in any way in privity with Wilkinson, the publisher of the alleged libel. It only shows that he was a vendor of newspapers and sold some which contained the alleged libel. The only cause of action in the statement of claim is a joint tort on the occasion when the original publication in London took place. Two separate torts cannot be combined in a single action against two defendants: *Sadler* v. *Great Western Railway Co.* (1). [HOLMES, L.J.:—Suppose in an action of tort against A. and B., the jury found that A. committed a tort, but B. did not, what would be the result?] If the jury found in favour of either defendant, there must be a verdict for both: *Dawson* v. *M'Clelland* (2). There was no action "properly brought" against Eason within Order XI, Rule 1 (*h*). I admit that Wilkinson waived all irregularity up to notice of trial by entering an unconditional appearance. But there is no defendant within the jurisdiction. The notice of discontinuance destroyed the foundation on which the action rested. The plaintiff by serving it cut off the branch on which his right to bring the action in this country depended. Order XI affects jurisdiction: *British Wagon Co.* v. *Gray* (3), in which it was held that the parties to an action cannot by contract give the Court jurisdiction which the rules do not confer. In order to bring a case within Order XI, Rule 1 (*h*), there must be an apparent cause of action against the defendant served within the jurisdiction: *Witted* v. *Galbraith* (4), where the Court of Appeal reversed the decision of the Queen's Bench Division (5) upon the application of the corresponding English rule, Order XI, Rule 1 (*g*). Lindley, L.J., in giving judgment at p. 579, said, "It is said that the present case comes within that rule. There is an easy method of testing whether this is true. Supposing that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so. There is no plausible cause of action against the brokers" (*i.e.* the defendants within the jurisdiction). "I come to the conclusion that

(1) [1896] A. C. 450.
(2) [1899] 2 I. R. 486, 494.
(3) [1896] 1 Q. B. 35.
(4) [1893] 1 Q. B. 577.
(5) [1893] 1 Q. B. 451.

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the brokers have been brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a *bona fide* case of an action properly brought against a person who has been served within the jurisdiction, consequently there is no right to proceed under the Order." Applying that test here, if Wilkinson had been in Ireland, would Eason have been made a co-defendant? Under the Judicature Act, 1877, section 27 (5), the power of the Court to stay proceedings which are frivolous or vexatious, or are an abuse of the process of the Court, is expressly preserved. If the plaintiff were entitled to aggravated damages against Wilkinson, it is quite settled that he could not get them against Eason: Mayne on Damages, 9th ed., p. 673. In *Watkins* v. *North American Land and Timber Co.* (1), Lord Davey said that if it was made out that a person was induced by fraud to come within the jurisdiction for the purpose of serving him with a writ in an action, he would have no hesitation in setting aside the service as an abuse. A similar order had been made in *Stein* v. *Valkenhuysen* (2), where a judgment creditor fraudulently enticed his debtor, who was residing abroad, to come to England, and had him arrested immediately upon his arrival. The Court acted on the ground that its process had been abused. The principle governing the proper practice under Order XI, Rule 1 (*g*), in England, corresponding to clause (*h*) in our rules, is stated with great precision by Pearson, J., in *The Yorkshire Tannery and Boot Manufactory* v. *The Eglinton Chemical Co.* (3). He says (p. 83), "If I had such an application before me, I should require it to be shown that the person served within the jurisdiction was either the principal defendant or at least as much a substantial defendant as a person sought to be served out of the jurisdiction."

Serjeant Moriarty, K.C., and *Chambers, K.C.* (with them *Coffey*), for the plaintiff:—

The action was properly framed. Wilkinson is sued as proprietor of the paper containing the libel, and Eason is sued as the publisher of it in Dublin.

(1) 20 Times, L. R. 534. (2) E. Bl. & E. 65. (3) 54 L. J. Ch. (N. S.) 81.

The action was instituted in June, 1910, before the decision in *Ross* v. "*Winning Post*" (1). What is there to show that the action was not brought *bona fide*? What evidence is there of fraud? Of course the measure of Eason's liability would be different from that of Wilkinson. If Eason showed that he did not know that the libel was in the paper he sold, that he was guilty of no negligence, and acted without malice, he would be entitled to a verdict. But even in that case Wilkinson's liability to the plaintiff would remain. "Everyone who writes, prints, or publishes a libel, or is in any way responsible for its being written, printed, or published, may be sued by the person defamed" (Odgers on Libel, 3rd ed., p. 183, 4th ed. 157). "If the libel appear in a newspaper, the proprietor, the editor, the printer, and the publisher are liable to be sued either separately or together" (*ibid.*). As to joinder of defendants, see Order XVI, Rule 4. *The British Wagon Co.* v. *Gray* (2) has no application to the present case. There the Court had no jurisdiction to make an order. There was no defendant within the jurisdiction who could lawfully be joined, and consent could not give jurisdiction: see note on this case in the Annual Practice, 1911, p. 88. The unconditional appearance waived all objection to the jurisdiction: Encyclopædia of the Laws of England, vol. i., 421; *Tevenan* v. *Van den Bergh* (3), see judgment of Fitz Gibbon, L.J.: *Maher* v. *Hibernian Development Co.* (4). If the order of Ross, J., was erroneous, why did not Wilkinson move to set it aside? *Preston* v. *Lamont* (5): In that case an order for leave to serve the writ out of the jurisdiction was wrongly made, and the defendant did not move to set it aside. The Court held that he could not afterwards raise an objection to the jurisdiction by plea. It is necessary to d' inguish between jurisdiction to order service of the writ in another country and jurisdiction to try the case here. A subsequent act cannot make a prior one fraudulent, and it is impossible to infer from a discontinuance in April, 1911, that the application in July, 1910, to serve the concurrent writ was a fraudulent device—an abuse of process. If Eason had been

(1) 45 Ir. L. T. R. 89; *infra*, p. 459.
(2) [1896] 1 Q. B. 35.
(3) 1 New Ir. Jur. R. 17.
(4) 3 New Ir. Jur. R. 92.
(5) 1 Ex. Div. 361.

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made a party merely to get the order to serve Wilkinson, surely the plaintiff would have discontinued against Eason as soon as Wilkinson appeared.

THE LORD CHANCELLOR:—

We have considered this case during the hearing and the able arguments which have been addressed to us, and we think that we would not now be justified in occupying public time by calling upon Mr. Sullivan. The Court below having been equally divided, we must form our own opinion; but we prefer to follow the opinion of Mr. Justice Wright, which in part conflicts with that of Mr. Justice Kenny.

I do not think it necessary in the view we take of the case to consider the question whether or not this was a joint tort, or on what principle damages (if any) would be assessed at a trial.

This writ was issued against Eason & Son, on the 27th April, 1910; and, pursuant to an order of Mr. Justice Ross, dated the 29th July, 1910, a concurrent writ for service out of the jurisdiction was issued on the 4th August, 1910, against the defendant Wilkinson, and was served upon him in London. Each defendant entered an appearance, and a statement of claim was delivered on the 16th November, 1910, the cause of action as alleged being a joint tort. Each defendant delivered a statement of defence, and on the 26th April, 1911, notice of trial was served; and on the same day notice of discontinuance was served upon the defendants, Eason & Son. It is admitted here, and I think it is clear, that until that notice of discontinuance was served, the defendant Wilkinson, could not have successfully instituted any motion of this kind, as he had entered an unconditional appearance, delivered a defence, and taken other steps in the action; but this notice of discontinuance entirely alters the position. Let us see the rule under which the order of Ross, J., was made: Order XI, Rule 1, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever" (*inter alia*) (*h*) "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within

the jurisdiction." That rule contemplates an action *properly* brought against a defendant within the jurisdiction, and the joinder of a party outside the jurisdiction who is a necessary or proper party to that action—that is the rule. Here we have it admitted, in my opinion, by the plaintiff's own act, that the action against Eason & Son was not properly brought, that Eason & Son were not proper defendants, and that the plaintiff could not be successful in his action against Eason & Son. I draw the inference that the plaintiff used the proceedings against Eason & Son to enable him to join the foreigner as a defendant. It was admitted on the 26th April that there was no cause of action against Eason & Son. I do not say that bringing the action against Eason & Son was an abuse of the process of the Court; but it was an abuse of the rule which I have read—it was an evasion, a misapplication of the rule.

I do not say that there would have been jurisdiction if judgment had been entered for the plaintiff against Wilkinson, to set it aside; but the question is, can the action against this foreigner—for he is a foreigner for the purpose of this rule—be allowed to proceed now? The act of the plaintiff himself shows that the action ought not to go on. I draw the inference that Eason & Son were never at any time proper defendants; that they were joined merely for the purpose of bringing in Wilkinson. I can suggest no other reason for their being made defendants.

For these reasons I think that the judgment of Wright, J., is the more satisfactory one to adopt, and I follow it, on the ground that this action is really an evasion of the rule, and I hold that the action ought not to proceed. If the plaintiff wishes to sue Wilkinson, he must do so in England. We are not depriving him of his remedy: he can go on there. As regards the costs incurred by reason of the proceedings having been suffered to go on so far, the plaintiff is himself to blame for this. He has waited until the 26th of April to discontinue against Eason & Son. It is clear that if the notice of discontinuance had been served on the 30th July, the day after Mr. Justice Ross made his order, there would have been no answer to an application to set it aside. In my opinion, the discontinuance relates back to the bringing of the action against Eason & Son;

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and consequently, as the joinder of Wilkinson was only made possible by reason of the writ having been served on Eason & Son —a writ which never should have been served—this application must be granted with the consequent costs.

HOLMES, L.J. :—

During the earlier part of the argument I was disposed to think that, in the circumstances of the case, there was no jurisdiction to make the order to serve Wilkinson ; but I am satisfied, after hearing Serjeant Moriarty and Mr. Chambers, that that order cannot be impeached on the ground of want of jurisdiction. The decision at which I have arrived rests on other grounds, namely, that having regard to the facts of this case, which have now fully developed, the proceedings must be regarded, as the Lord Chancellor has pointed out, as an abuse, not of the jurisdiction of the Court, or of its practice, but as an abuse of the rule under which the order was made (1). As I understand that rule, it provides that by naming as a defendant within the jurisdiction a proper person, legitimately sued as liable to the plaintiff, the plaintiff can obtain an order from the Court enabling him to serve a person who is jointly liable with that defendant, or who has committed the same tort, although resident out of the jurisdiction.

As far as the defendant in this case who resides in England is concerned, when the order was made he would have known little or nothing about it, except that two defendants, each of whom might have been *prima facie* liable, were named in the action. That continued down to the time when notice of trial was served. Pleadings had been delivered, and no one could suppose from anything that occurred in the meantime that Eason & Son had been joined for any purpose other than the legitimate purpose of obtaining a verdict against them. But, on the same day on which notice of trial was served, the action was discontinued against Eason & Son. What inference am I to draw from that, seeing that no change had taken place in

(1) Ord. XI, R. 1 (*h*).

the meantime, either as regards Eason & Son or the defendant in London? The first thing that suggested that there was something curious about the case was that, after everything had been done in preparation for the trial, the plaintiff, without any negotiation or settlement, discontinued the action against Eason & Son altogether. The only inference I can draw is that the plaintiff had never any cause of action against Eason & Son, and only sued them for a collateral object, namely, to get the order to serve this defendant resident in London.

Ought we to allow a rule, which is very stringent in its terms, to be used for such a purpose? I do not think we ought; and, therefore, under the circumstances, we must make the order which the King's Bench Division was asked to make, and as to which the members of that Court were equally divided.

CHERRY, L.J.:—

I concur. The fact which most strongly affects my mind in arriving at this decision is that the plaintiff's counsel were unable to show during the argument that any change of circumstances had occurred, from the date of the order made by Mr. Justice Ross to the time of serving notice of discontinuance as against Messrs. Eason, and we must assume that there was no such change. It is clear, therefore, that the notice of discontinuance was an admission that Eason & Son should never have been joined as defendants in the action, and were never proper parties to it.

Solicitor for the plaintiff: *C. Friery.*

Solicitors for the defendant Wilkinson: *Longfield, Kelly, & Armstrong.*

W. G.

K. B. Div. 1911.

Jan. 19, 20. Feb. 3.

Appeal. May 8.

O'LEARY, Applicant; DEASY & Co. Respondents (1).

Landlord and tenant—Yearly tenancy—Condition—Tied publichouse—Agreement to continue exclusive dealing with assignees of reversion—Notice of such agreement to assignee of tenancy—Breach of agreement—"Good and sufficient cause for determination of tenancy"—Town Tenants Act, 1906, *ss.* 5, 7.

M., a brewer in the town of S., let a publichouse to K. as tenant from year to year, on the terms that K. would deal with M. exclusively for draught porter. The house, with the licence attached, was worth far more than the yearly rent, and, in fact, the only profit M. had out of it was the benefit of the agreement for exclusive dealing. D. & Co., brewers in the town of C., purchased M.'s reversion in the house, but did not acquire his brewery at S., which was discontinued. D. & Co. entered into an arrangement with K. to continue the yearly tenancy "on the same conditions as K. had formerly held under M." K. afterwards assigned the house to O'L., and informed O'L. "of the arrangement to deal with D. & Co. for draught porter." O'L. did not take any draught porter from D. & Co., but dealt with a rival firm, and D. & Co. evicted O'L. on notice to quit.

Held, that the condition as to exclusive dealing with D. & Co. for draught porter was valid and binding on O'L.; and that the breach of it was good and sufficient cause under the Town Tenants Act for the determination of the tenancy, and that O'L. was therefore not entitled under the Act to compensation for disturbance.

Case stated by the Judge of Assize (Lord Justice Cherry) at the Summer Assizes, 1910, for the opinion of the King's Bench Division, upon the hearing of an appeal from the decree of the County Court Judge of the County Cork, West Riding, awarding the claimant £70 compensation under the Town Tenants Act for loss of goodwill and expenses of removal, in respect of a licensed house in the village of Drimoleague in the said county.

The case stated was as follows:—

"1. The house was formerly owned by Timothy Hurley, and

(1) In the King's Bench Division before Lord O'Brien, L.C.J., and Madden and Wright, JJ.

the licence was in his name. In 1881 Hurley let the house to Daniel M'Cartie, owner of the Skibbereen Brewery, at a rent of £11 per annum, and sold his interest in the licence to M'Cartie for £25.

"2. In 1882, M'Cartie, by verbal agreement, let the house to Mrs. Kelleher at the yearly rent of £11, and transferred the licence to her. It was a condition of the tenancy between Mrs. Kelleher and M'Cartie that Mrs. Kelleher should deal exclusively for draught porter with the Skibbereen Brewery.

"3. The Skibbereen Brewery went into liquidation and ceased to do business, and in 1889 M'Cartie's interest in the house in question was conveyed to the respondents, Deasy & Co., brewers of Clonakilty, subject to the rent of £11, payable to Hurley. Deasy & Co. did not purchase the business of the Skibbereen Brewery.

"4. Mr. Canty, managing director of Deasy & Co., had an interview with Mrs. Kelleher after the assignment by M'Cartie, and it was then agreed that Mrs. Kelleher should be continued as tenant of the said house at the same rent, and on the same conditions, as she had formerly held under Daniel M'Cartie, and she thereupon agreed to deal exclusively for draught porter with Deasy & Co., who are brewers carrying on business at Clonakilty, Co. Cork. The said Margaret Kelleher always dealt with the Skibbereen Brewery for draught porter down to 1889, and from 1889 to 1906 dealt exclusively with Deasy & Co.

"5. In 1906 Mrs. Kelleher assigned said house to her niece, Honora O'Leary, the present applicant, and at the time of the assignment informed her of the arrangement to deal with Deasy & Co. for draught porter. The said Honora O'Leary admitted that the value of the house and licence was considerably more than £11 a year.

"6. After the assignment was completed, and the licence transferred into the name of Honora O'Leary, she refused to take any draught porter from Deasy & Co., and got it from rival brewers, and, in consequence thereof, on the 23rd October, 1908, Deasy & Co. served notice to quit on Honora O'Leary, and on the 16th December, 1909, obtained judgment for possession against her, which was afterwards executed.

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"7. It was contended on behalf of Deasy & Co. that the contract of tenancy between Mrs. Kelleher and the respondents included an undertaking to deal exclusively with them for draught porter, and that the refusal of Honora Leary to carry out this arrangement was a good and sufficient cause for terminating the tenancy which relieved them from liability to pay compensation for disturbance.

"8. It was contended on behalf of the applicant:—

"(*a*) That the arrangement to take porter exclusively from the landlords was not a condition of the tenancy.

"(*b*) That such a condition in order to be binding upon the tenant should be in writing.

"(*c*) That the breach of such a condition was not "good and sufficient cause" for determining the tenancy.

"(*d*) That such a condition, even if it had the effect of a covenant, would not run with the land so as to bind the assignees of the tenant's interest.

"(*e*) That even if it was a condition of the tenancy, it applied only to the Skibbereen Brewery, and could not be enforced by the respondents as regards their brewery.

"The questions for the Court were:—

"1. Was it a valid and binding condition of the applicant's tenancy under the respondents that she should deal exclusively with them for draught porter?

"2. If so, was the breach of this condition good and sufficient cause for the determination of the tenancy within the meaning of the Town Tenants Act?

"If both these questions should be answered in the affirmative, the decree of the County Court should be reversed, and the claim for compensation dismissed; otherwise the decree should be affirmed.

"Richard R. Cherry."

G. M'Sweeny (with him *A. M. Sullivan, K.C.*), for the applicant.

Norwood and *Conner, K.C.*, for the respondents.

A. M. Sullivan, K.C., in reply.

Feb. 3.

LORD O'BRIEN, L.C.J.:—

I would ask my brethren to precede me in giving judgment. I agree in the result.

MADDEN, J.:—

In the year 1882 Mrs. Kelleher became tenant to Daniel M'Cartie, the owner of a brewery, of a licensed publichouse at the yearly rent of £11. It was a condition of the tenancy that she would deal exclusively with the lessor for porter.

In 1889 the defendants acquired the interest of M'Cartie in the house, and agreed to continue Mrs. Kelleher as tenant at the same rent and on the same conditions as when she held under M'Cartie. Thenceforth Mrs. Kelleher was bound as between herself and the defendants by all the conditions of the original letting. In 1906 Mrs. Kelleher assigned her interest in the house to the plaintiff, who had actual notice at the time of the restrictive condition in the letting.

The question submitted is, whether this condition is valid and binding on the plaintiff.

It was contended that the agreement in 1889 ought to have been in writing under the Statute of Frauds. But it created or transferred no interest in land. It was simply the case of the owner of the reversion on a yearly tenancy keeping on the tenant, instead of evicting him, on the existing terms and conditions of his tenancy.

The question which led the Lord Justice to state the case was evidently that which was argued before him, "Whether the condition, even if it had the effect of a covenant, would not run with the land so as to bind the assignee of the tenant's interest." The case seems to have been argued before him on the assumption that, if the condition were collateral, it would not be valid and binding as regards the applicant's tenancy. This was so in a former state of the law. But it is now settled that a condition of this kind, though collateral and not running with the land at law, is binding in equity on an assignee who has actual or constructive notice of its existence: *Luker* v. *Dennis* (1).

(1) 7 Ch. D. 227, *per* Fry, J.

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Both questions ought, in my opinion, to be answered in the affirmative.

WRIGHT, J.:—

The history of the licensed house in question, and tenancy for the last thirty years, may be shortly stated. In 1881 Daniel M'Cartie, who was owner of the Skibbereen Brewery, became tenant of the house at the yearly rent of £11; he also got the licence in 1882. M'Cartie let the house to Mrs. Kelleher at the same rent, £11, at which he held it, and he got the licence transferred to her. The case finds that the value of the house and licence was considerably more than £11 a year. The case finds that it was a condition of her tenancy that she should deal exclusively for draught porter with the Skibbereen Brewery. In fact the only profit to the landlord was the benefit of her custom as a publican.

Prior to 1889 the Skibbereen Brewery went into liquidation, and ceased to do business. The brewery and M'Cartie disappeared. Deasy & Co. (The Clonakilty Brewery) bought M'Cartie's interest in the house, and became Mrs. Kelleher's landlords; they consequently became liable to pay the rent of £11, and entitled to receive a like amount from her.

Paragraph 4 of the case finds that about this time an agreement was made between Mrs. Kelleher and her landlords, Deasy & Co., by their managing director, Mr. Canty, that she should be continued as tenant, at the same rent and on the same conditions as she formerly held under M'Cartie, and she thereupon agreed to deal exclusively for draught porter with Deasy & Co. This seems, under the changed circumstances, a most natural and almost obvious agreement to come to. The old landlord and the old brewery had disappeared, and were replaced by a new landlord and new brewery, Deasy & Co. The custom of the publichouse for draught porter was transferred to Deasy & Co., the new landlords. As already stated, the benefit of her custom as a publican was the only profit to the landlord derivable from her tenancy of this house. The tenancy was a yearly tenancy determinable by a six months' notice to quit. In agreeing to continue Mrs. Kelleher as tenant there was, in my opinion,

ample consideration for the transfer of her custom to the new brewery Co., and for the agreement to that effect found by Cherry, L.J. It was, in my opinion, a valid binding condition of Mrs. Kelleher's tenancy. That tenancy never became or was more than a yearly tenancy. No writing was necessary for the agreement between Mrs. Kelleher and Deasy & Co., found in paragraph 4 of the case to have in fact been made.

Mrs. Kelleher appears to have been an honest woman. She loyally observed the condition for seventeen years, 1889–1906. In 1906 she, by deed, assigned the house to her niece, the present applicant, and the case finds (paragraph 5) that at the time of the assignment she informed her of the arrangement to deal with Deasy & Co. for draught porter.

The case of *Luker* v. *Dennis* (1) conclusively decides that the assignee of the house, Honora O'Leary, taking with notice of this agreement is bound by it. It is unnecessary for the purpose of our decision to consider and decide whether this condition or term of the agreement ran with the land. In my opinion both the questions reserved for this Court should be answered in the affirmative.

LORD O'BRIEN, L.C.J.:—

I agree in the conclusion at which my brethren have arrived, but I confess I have difficulty as to the precise basis of fact with reference to which we have to deal.

J. G. T.

The applicant appealed.

G. M'Sweeny (with him *A. M. Sullivan, K.C.*), for the appellant:—

The term as to exclusive dealing in the tenancy, as originally created in Mrs. Kelleher, was to deal for draught porter with the Skibbereen brewery; and even if this term is binding on the appellant as her assignee of the tenancy, it could not be held to compel the appellant to deal with Deasy's brewery, which is a

(1) 7 Ch. Div. 227.

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different concern, the property of other parties, and situated in a different town. If the agreement between Mrs. Kelleher and Canty, on behalf of Deasy & Co., was to create a new tenancy, what was to be its term? The hypothesis of a new tenancy is resorted to for the purpose of making out that there was a consideration for the agreement to deal with Deasy & Co. But if so, it must follow that Mrs. Kelleher was to get something more than the existing tenancy from year to year; that she was entitled to keep possession as long as she continued to deal with Deasy & Co. for draught porter. That would be at least equivalent to a lease for life (1), and could not be validly created by a mere verbal agreement (23 & 24 Vict. c. 154, s. 4). The agreement was a merely collateral contract, and would not bind the appellant as assignee of the tenancy. There was really no consideration for the agreement with Mrs. Kelleher to deal exclusively with Deasy & Co. They had a very limited power over her as landlords. They had not served notice to quit, and if, according to the description of the bargain in the case stated, she was to continue on as tenant under the same conditions as she held under M'Cartie, she was getting no additional benefit at all.

Luker v. *Denis* (2) was the decision of a Judge of first instance, and though, perhaps, the Divisional Court was bound to follow his decision, it is not binding upon this Court. [Counsel cited *De Lassalle* v. *Guildford* (3) and *Zimbler* v. *Abrahams* (4).]

Conner, K.C., and *Norwood*, for the respondents:—

The arrangement between Canty on behalf of Deasy & Co. and Mrs. Kelleher amounted in law to the creation of a new tenancy between them, subject to the condition that she, and anyone in the possession of the house by assignment from her, would deal with Deasy & Co. for draught porter. This was the only profit Deasy & Co. got out of the letting. The rent of £11 was much less than the letting value. Unless a new tenancy was created in 1889, Deasy & Co. could have evicted Mrs. Kelleher

(1) See *Wood* v. *Davis*, 6 L. R. I. 50.
(2) 7 Ch. D. 227.
(3) [1901] 2 K. B. 215.
(4) [1903] 1 K. B. 577.

without liability to compensation for disturbance under the Town Tenants Act (see section 5). Therefore, keeping her on as tenant at this very low rent was ample consideration for the agreement with Canty on behalf of the firm, and if so *Luker* v. *Dennis* (1) is a conclusive authority that an assignee with notice would be bound. In that case Fry, J., followed the trend of judicial opinion expressed by the English Court of Appeal as to the extension in recent years of the equitable doctrine of notice of such a condition. But Deasy & Co. could undoubtedly have enforced the agreement, even if the old tenancy continued, and whether the agreement did or did not run with the land.

In *Clegg* v. *Hands* (2) two persons who were brewers let a public-house to the defendant on the terms that he and his permitted assigns would only sell beer purchased from the lessors and their assigns. They afterwards assigned their brewery and their interest in the public-house to another brewer carrying on business in another place. The two lessors dissolved partnership and ceased to carry on business, and their premises were shut up; the defendant refused to deal with the assignees, and he and the two lessors brought an action to restrain the defendant from selling beer purchased from other brewers. On appeal from the Vice-Chancellor of the Duchy of Lancaster, the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) held that the benefit of the covenant was not restricted to assigns carrying on the same brewer's business as the lessors; that as a covenant relating to the way in which the business was to be carried on, it was enforceable by the reversioner; and that the defendant, having obtained the lease at a lower rent by reason of the restrictive covenant, ought to be restrained from using the house in a way inconsistent with the covenant. This is clearly a case where by section 7 (3) of the Act, the tenant, having broken the condition, is excluded from claiming compensation for disturbance.

(1) 7 Ch. D. 227. (2) 44 Ch. D. 503.

(3) 6 Edw. 7, c. 54, s. 7, "A tenant who is evicted for breach of any condition of his tenancy shall not be entitled to any compensation for disturbance under this Act."

Appeal. 1911.

O'Leary v. Deasy.

The Lord Chancellor:—

We are all of opinion that the appeal should be dismissed. We all agree that on the facts as stated in the case there was a new letting by Deasy & Co., after they purchased the reversion, to Mrs. Kelleher, with new terms, made for valuable consideration, one of these terms being, that she should take draught porter from Deasy & Co. The Skibbereen Brewery had ceased to exist. This was a valid condition, and binding on the applicant, Honora O'Leary, who acquired Mrs. Kelleher's interest with notice of the condition; and, it having been broken by the applicant, who refused to deal with Deasy & Co., an ejectment was brought on notice to quit, and the question is whether the applicant is entitled to compensation under the Town Tenants Act? We think that, as the condition was broken, she is not entitled to compensation under the Act.

Palles, C.B., and Holmes, L.J., concurred.

Appeal dismissed with costs.

Solicitor for the applicant: *J. Travers Wolfe.*
Solicitors for the respondent: *T. R. Wright & Sons.*

W. G.

JOSEPH ROSS *v.* EASON & SON, LIMITED. THE "WINNING POST" (1906), LIMITED, AND WALBROOK & CO., LIMITED (1).

Appeal.
1911.
Feb. 22, 27.

Practice—Libel—Publication—Service out of the jurisdiction—Necessary or proper party to action properly brought against defendant within the jurisdiction—Order XI, 1 (h).

A letter, alleged to be a libel on the plaintiff, was published by a London newspaper, copies of which were sold in Dublin by Eason & Son, a firm of Dublin newsagents, between whom and the publishers of the paper no contract of agency existed, and who were, as they alleged, ignorant of the alleged libel. Proceedings for the alleged libel were threatened by the plaintiff against the publishers and printers of the paper in London, and on their refusal to nominate a solicitor in Ireland to accept service of a writ of summons on their behalf, the plaintiff, without any previous communication, issued a writ of summons claiming damages for the alleged libel against Eason & Son, and then applied for and obtained an order under Order XI, 1 (*h*), granting leave to issue and serve a concurrent writ for service out of the jurisdiction on the publishers and printers of the paper in London, alleging that the latter were necessary and proper parties to the action brought against Eason & Son, within the jurisdiction.

Held, by the Court of Appeal (affirming the decision of the King's Bench Division), that the order for service out of the jurisdiction should be set aside, on the ground that the action against Eason & Son was only instituted for the purpose of bringing the English defendants within the jurisdiction of the Irish Courts.

APPEAL from an order of the King's Bench Division, dated the 27th January, 1911, whereby it was ordered that the order of the 12th December, 1910, made in this action, granting leave to the plaintiff to issue a writ of summons concurrent with the writ already issued against the "Winning Post" (1906), Ltd., and Walbrook & Co., be discharged, and that the writ of summons

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

Ross v. Eason.

issued in pursuance thereof and the service of the said writ be set aside. The action was one for an alleged libel, consisting of a letter published in an issue of the "Winning Post," dated the 26th November, 1910, which purported to have been written to the paper by the plaintiff, but was in fact a forgery, and which represented the plaintiff as one interested in racing matters and a betting man, by reason of which the plaintiff, who was the owner of a temperance hotel, alleged that he had suffered loss in his business. On the 29th November, the plaintiff's solicitor wrote to the Secretary of the "Winning Post" and to Walbrook & Co., the printers of the paper, complaining of the alleged libel, and threatening proceedings in respect thereof; on the 1st December, 1910, the London solicitor for the "Winning Post, Company," replied, stating that the letter was published in the *bona fide* belief that it was a genuine letter, and undertaking to insert an apology in the next issue of the paper; on the 2nd December, 1910, the plaintiff's solicitor further wrote asking the solicitor for the "Winning Post" to nominate a solicitor in Ireland, to accept service of a writ of summons on behalf of the "Winning Post" and Walbrook & Co., to which, on the 6th December, 1910, the solicitor for the "Winning Post" replied, refusing to nominate a solicitor in Ireland, and pointing out that the proposed action could only be instituted in England.

On the 7th December, 1910, the writ of summons in this action was without any previous communication issued against Messrs. Eason & Son, Ltd., a firm of newsagents carrying on an extensive business in Dublin, who had sold copies of the "Winning Post" containing the alleged libel; and on the 12th December, 1910, the plaintiff applied under Order XI, 1 (*h*) for, and obtained, the above-mentioned order, granting him leave to issue and serve a concurrent writ out of the jurisdiction upon the "Winning Post," Ltd., and Walbrook & Co., Ltd., who, on the 27th January, 1911, applied to the King's Bench Division (consisting of Palles, C.B., Gibson and Boyd, JJ.), to set aside the last-mentioned order. Several affidavits were filed for the application; the plaintiff alleging that he had a good cause of action against Messrs. Eason & Son, Ltd., and that the

defendants, the "Winning Post," Ltd., and Walbrook & Co., were necessary and proper parties to such action; that he had instructed his solicitor to ascertain all the parties who were concerned with the publication and distribution of the alleged libel, and that it was his intention to prosecute his action against the said parties to a finish. In an affidavit filed by the manager of the "Winning Post," Ltd., it was alleged that no agency of any kind existed between either of the English defendants and Messrs. Eason & Son, Ltd., and that no account in connexion with the sale of the said paper existed between them, and in an affidavit filed by the manager of Messrs. Eason & Son, Ltd., it was alleged that the latter firm purchased the copies of the paper containing the alleged libel from Messrs. W. H. Smith & Son, Ltd., and not from the "Winning Post" Company; that neither the said manager nor any member of the firm or staff was aware of the letter complained of; that if it had been brought to their notice they would have had no reason to suspect it was other than a genuine letter; that there was no negligence on the part of the said firm, and that the firm did not know nor had they any ground for suspecting that the "Winning Post" was likely to contain the alleged or any libellous matter.

The Right Hon. J. H. Campbell, K.C., and *James Henry*, for the appellant:—

There is here an action properly brought against defendants within the jurisdiction, viz., Eason & Son, who have published the libel complained of in Dublin. That firm may, at the trial, avail themselves of the defences that proved successful in *Emmens* v. *Pottle* (1); but the Court cannot, on such an application as the present, determine the question of the innocence of Eason & Son. That is a matter for the jury. There being an action properly brought against a defendant within the jurisdiction, we contend that the publishers and printers are proper and necessary parties to that action within the meaning of Order XI, 1 (*h*). The test, as laid down by Lord Esher, M.R., in *Massey* v. *Heynes* (2), viz.,

(1) 16 Q. B. D. 354. (2) 21 Q. B. D. 330, at 338.

Appeal. 1911. Ross v. Eason.

"supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?" is here satisfied. It was, no doubt, formerly held that a defendant was not liable for the repetition by a third person of a libel promulgated by him: *Ward* v. *Weeks* (1); *Riding* v. *Smith* (2); but the law is now otherwise where, as in the case of a newspaper, the publication is intended to be sent abroad: *Speight* v. *Gosnay* (3); *Whitney* v. *Moignard* (4); *Lynch* v. *Knight* (5); *Ratcliffe* v. *Evans* (6). That the causes of action against the separate defendants can be joined in the one action is shown by *Frankenburg* v. *Great Horseless Carriage Co.* (7), and *O'Keeffe* v. *Walsh* (8). [Reference was also made to *Vizetelly* v. *Mudie's Select Library, Ltd.* (9); *Chance* v *Beveridge* (10), and Bower on Libel, p. 8.]

Ronan, K.C., W. M. Whittaker, K.C., and *James Andrews*, for the respondents:—

Apart from any question of the wrongful joinder of the parties, it is clear on the correspondence that the defendants, Eason & Son, were "brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction": see judgment of Lindley, L.J., in *Witted* v. *Galbraith* (11). The action against Eason & Son was a clear afterthought, and was only instituted when the plaintiff's solicitor received the letter of 6th December, 1910, refusing to nominate an Irish solicitor to accept service. The jurisdiction of the Irish Courts cannot be thus attracted to enable what is really an English action to be tried in Ireland: *The Yorkshire Tannery and Boot Manufactory* v. *The Eglinton Chemical Co., Ltd.* (12); *Collins* v. *North British Mercantile Insurance Co.* (13). We contend further that the action against the English defendants cannot be joined with that against

(1) 7 Bing. 211.
(2) 1 Ex. D. 91.
(3) 60 L. J. (N. S.) Q. B. 231.
(4) 24 Q. B. D. 630.
(5) 9 H. L. C. 577.
(6) [1892] 2 Q. B. 524.
(7) [1900] 1 Q. B. 504.
(8) [1903] 2 I. R. 681, 730.
(9) [1900] 2 Q. B. 170.
(10) 11 Times L. R. 528.
(11) [1893] 1 Q. B. 577.
(12) 54 L. J. (N. S.) Ch. 81.
(13) [1894] 3 Ch. 228.

Eason & Son; the actions are based upon separate torts giving rise to separate causes of action: *Sadler* v. *Great Western Railway Co.* (1); *Dawson* v. *M'Clelland* (2). No doubt in an action in England against the publishers and printers of the paper, evidence of damages caused by the republication by Eason & Son could be given to increase the damages in the English action; but that is a different thing from joining the separate causes of action based on separate torts in the one action.

Campbell, in reply.

THE LORD CHANCELLOR:— Feb. 27.

We are all of opinion that this appeal must be dismissed. From a consideration of the correspondence which passed between the plaintiff's solicitor and the publishers and printers of the "Winning Post" in London, I am driven to the conclusion that the action instituted against Eason & Son was not a *bona fide* action. The very day on which the plaintiff's solicitor received the letter from the English defendants refusing to nominate a solicitor in Ireland to accept service of a writ on their behalf, and pointing out that the action could only be instituted in England, the plaintiff, without any complaint of the alleged libel, or any intimation of his intention to make them defendants, issued a writ against Eason & Son. In my judgment that was an evasion, an abuse of the rule that should not be sanctioned. On the evidence and the particular facts of this case I have arrived at the conclusion that the action was not one properly brought against Eason & Son within the jurisdiction, and I agree with the judgment of the King's Bench Division, on the short ground stated by Mr. Justice Gibson, that the defendants, Eason & Son, were introduced merely for the purpose of bringing the other defendants within the jurisdiction—a judgment which is fully supported by the case of *Witted* v. *Galbraith* (3) referred to during the argument. I do not express any opinion on the question whether if an action had been properly

(1) [1896] A. C. 450, at p. 453.
(2) [1899] 2 I. R. 486, 494.
(3) [1893] 1 Q. B. 577.

Appeal. 1911.

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brought against Eason & Son within the jurisdiction, the English defendants could have been joined as necessary or proper parties to that action.

The Lord Chancellor.

Holmes, L.J. :—

If the only judgment given in the Divisional Court was that of Gibson, J., consisting of the words "I think that Eason & Son were introduced merely for the purpose of bringing the other defendants within our jurisdiction," I should have confined myself to expressing my concurrence without further observation; but as this might be taken as a tacit acquiescence in the grounds given by Palles, C.B., for holding that the "Winning Post," Ltd., is not a proper party to an action brought against Eason & Son, and as I am unable to agree therein, I desire to refer briefly to the matters discussed by him, especially as they are likely to arise often in applying Order XI, Rule 1 (*h*), to actions of libel.

The alleged libel in this case is contained in a newspaper called the "Winning Post," published by the "Winning Post" Co., Ltd., in London; but the action is brought against Eason & Son for the sale of this newspaper in Dublin; and it appears that Eason & Son in so selling were not acting as agents for the London publishers. They had bought the copies of this paper sold by them from W. H. Smith & Son, and were therefore neither servants nor otherwise representatives of the co-defendants whom it is sought to serve out of the jurisdiction. It is therefore argued that the "Winning Post" Co. and the London printers are not responsible for the acts of Eason & Son, and, therefore, are not proper parties to the action against that company. Many authorities relating to this question have been quoted, but I do not propose to refer to them.

As a rule, an individual or a company can only be sued for the acts of another when the latter is his or its agent; but I am of opinion that this rule is qualified in certain classes of cases of which actions for libel and slander are typical. If it is the intention of the person that first promulgates a libel or slander that the publication should be repeated to a particular person or

in a particular way, I hold the law to be now settled that such repetition is the joint act of both the original promulgator and of the person who repeats. Newspapers are published for circulation. If their circulation were to cease, their publication would be summarily stopped. It is the natural consequence of their publication, and the publishers certainly intend, that copies will be sold by W. H. Smith & Son, Eason & Son, and many other firms whose business is to distribute this class of literature. The publication of the libel in this case in London, or indeed in any other place other than in Dublin and the surrounding neighbourhood, would not affect the plaintiff. The injurious imputation on him which is alleged would only be understood in the locality in which he is known, and there can be little doubt that most of the copies of the "Winning Post" circulating in that locality are supplied by Eason & Son. Does the law give no remedy for this wrong against the publishing company primarily responsible for it? Mr. Ronan, as I understand his argument, admits that the damage thus done could be given in evidence and recovered in an action against the company for the publication by it in London. The authorities compel him to make this admission; but if the publishers are responsible for the consequences of Eason's acts, it must be because in law they are the joint acts of both. I see that the Lord Chief Baron referred to a previous case in the King's Bench Division (*Fitz Gibbon* v. *Eason & Son and The Saturday Review* (1)), which, although dissenting from the decision therein, he was prepared to follow for the sake of having uniformity in the decisions of the Court. I am glad to have the view I have expressed supported by that authority.

Palles, C.B., gave another ground for discharging the order for the service on the co-defendants out of the jurisdiction, as to the soundness of which I am doubtful. In his opinion, the action is not properly brought against Eason & Son, and, if so, I would agree with him that the order for service on the co-defendants ought not to have been made. It was decided in *Emmens* v. *Pottle* (2) that the vendor of a newspaper in the ordinary course

(1) 45 Ir. L. T. R. 91, note. (2) 16 Q. B. D. 354.

Appeal. 1911. Ross v. Eason. Holmes, L.J.

of his business, though he is *prima facie* liable for a libel contained in it, is not liable if he can prove that he did not know that it contained a libel, that his ignorance was not due to any negligence on his own part, and that he did not know and had no ground for supposing that the newspaper was likely to contain libellous matter.

The Lord Chief Baron is of opinion that this is the position of Eason & Son. I am far from saying that it is not; but in the reported cases on this subject the defence has been found by a jury; and it is rather a strong step to hold on an interlocutory application that a person *prima facie* liable for a libel has a good defence thereto. I am disposed to think that a jury would not hesitate to find in this case that Eason & Son did not know that the paper contained a libel, and that their ignorance was not the result of negligence; but I am not sure of the view a jury would take as to whether Eason & Son had no ground for supposing that the newspaper was likely to contain libellous matter. This depends to a great extent upon its character and reputation.

I could name newspapers that once flourished, but have now ceased to exist, whose circulation depended on the fact that they were to a considerable extent composed of matter that was *prima facie* libellous. A newsvendor who sold such papers cannot in my opinion excuse himself on the grounds that he has exercised reasonable care. If he desires to be safe, he ought not to sell them at all. I am far from suggesting that the "Winning Post" is of this character. My only source of knowledge is the affidavits. In saying this, I am not indulging in the proverbial ignorance claimed by, or at least attributed to, Judges, of contemporary persons and things known to every well-informed person except to members of the Bench. When the "Winning Post" began its career, I read portions of early numbers in the expectation of finding therein specimens of the real, if somewhat reckless, humour which characterized another coloured sporting print, but being disappointed in this expectation, the only issue I have looked at for years is that with which this action is conversant. If I am to judge thereby, it seems to contain information and comments of interest to sporting readers, in addition to "padding" too dull to interest anyone.

But an affidavit has been filed to show that its publishers have had an exceptional experience in libel actions; and this, if true, must have been known to Eason & Son. Therefore if the plaintiff's solicitor, when instructed to seek redress for the alleged libel, had at once determined to sue the Irish newsvendors and the London publishers and printers jointly, I should have been prepared to hold that the action was brought against them in good faith, and that, having served the writ on Eason & Son, he was entitled to an order for service on the co-defendants out of the jurisdiction. But the evidence is clear that for some reason—and I assume for a good reason—the solicitor never contemplated making Eason & Son defendants until he found that without joining them he could not sue in the Irish Courts the companies whom he regarded as really responsible; and that Eason & Son were brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction. For this reason, and on the authority of *Witted* v. *Galbraith* (1), I concur in the view taken by Gibson, J.

CHERRY, L.J.:—

I agree. I think that the decision of the Court of Appeal in England in *Witted* v. *Galbraith* (1) is a conclusive authority in favour of the view taken by the Court below in this case. Lindley, L.J., there lays down a very easy test as to whether a case comes within the sub-clause of the order which corresponds with our Order XI, R. 1 (*h*). "Supposing," he says, "that both the defendant firms were resident within the jurisdiction, would they both have been joined in the action?" I have no doubt whatsoever, on the evidence in the present case, that Eason & Son would not have been joined as defendants if the alleged libel had been published in an Irish newspaper, and that, in the words of Gibson, J., in his short judgment in the Court below, "they were introduced merely for the purpose of bringing the other defendants within our jurisdiction."

Having formed a clear opinion on this vital matter, I do not

(1) [1893] 1 Q. B. 577.

Appeal. 1911.

Ross v. Eason.

Cherry, L.J.

think it is necessary for me to state my views on the other interesting and important questions which were discussed before us; and I particularly desire to avoid saying anything which would prejudice the plaintiff should he desire to proceed with his action against Eason & Son.

Solicitor for the appellant: *H. J. M'Cormick.*
Solicitors for the respondents: *H. Wallace & Co.*

R. ST. J. C.

FORAN *v.* ROCHE (1).

Appeal.
1911.
Feb. 20.

Practice—Remitting action to County Court—Slander and libel—Grave misconduct in course of employment imputed—Persistence in repetition of charge.

An action having been brought for slander and libel imputing to the plaintiff dishonesty in the course of his employment, it appeared on a motion by the defendant to remit the action for trial to the County Court that the plaintiff, who was admittedly without visible means, was a carter in the employment of a coal merchant, and was employed to deliver a ton of coal to the defendant. According to the plaintiff's affidavit the defendant accused him in the presence of two servants of attempting to rob her, by keeping back three bags. She unquestionably telephoned to his employer to this effect, in consequence of which the coal was weighed and found to be only a trifle under the ton, which might be accounted for by taking a bucketful for use between the delivery and the re-weighing. The defendant, however, wrote to the employer and the plaintiff's solicitor, persisting in the charge. On the motion to remit, the defendant disclaimed any intention to plead justification, denied that she charged the plaintiff in the presence of servants with dishonesty, and relied on privilege as to the communications to the employer and solicitor. There were no grounds for attributing any personal malice or doubting the *bona fide* belief of the defendant, though erroneously formed, that the delivery was short by three bags.

Held, by the Lord Chancellor and Holmes, L.J., having regard to previous decisions of the Court of Appeal, that the case ought not to be remitted. *Diss.* Cherry, L.J.

Per Cherry, L.J. No general principle can be laid down as to whether a case ought or ought not to be remitted beyond the statutable test of fitness to be prosecuted in the Superior Court.

APPEAL from an order made by Kenny, J., sitting for the King's Bench Division, remitting the action for trial before the Recorder of Dublin. The action was brought to recover damages for alleged libel and slander.

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

Appeal. 1911.

FORAN v. ROCHE.

The plaintiff, in his affidavit filed to oppose the motion, stated he was employed by Messrs. S. Robinson & Co., coal merchants, as a carter for the delivery of coals. On the 30th December, 1910, he delivered a ton of coal in sixteen bags at the defendant's residence, and immediately afterwards the defendant, in presence of two of her servants, accused him of having delivered three bags short, saying, "You only put in thirteen bags, and I am not going to be robbed by you. I shall communicate with your employer." She refused to sign a receipt for the coal, and telephoned to Messrs. Robinson making the complaint. By their instructions the coal was taken out of the cellar and weighed, when it was found to weigh only 7lb. less than a ton. The plaintiff brought back the coal to the defendant's residence with a letter from Messrs. Robinson stating the weight. The defendant read the letter and said, "You had only thirteen bags." She then wrote a letter to Messrs. Robinson, in which she said, "The tone of your letter surprised me, as I was under the impression that in exposing your man's fraud I was doing you a service as well as myself."

In a letter to the plaintiff's solicitors she stated that the fact that only one ton of coal was found in her vault conclusively proved that the plaintiff could not have delivered a ton, as otherwise what was in the vault would be one ton and a quarter.

The plaintiff, in his affidavit, said that his employers had informed him that he should clear his character of the charge or lose his employment.

It was proved by a clerk of Messrs. Robinson that the telephone message sent by the defendant was, "The man that was delivering the coal only delivered thirteen bags instead of sixteen. I was at the window watching and checking the bags. I have a note in a memorandum book, and put down a stroke for every bag he delivered, which was only thirteen."

The defendant made an affidavit in reply, in which she denied that any of her servants were present when she made the complaint to the defendant, and denied having said that he robbed her. She made the statement that there were three bags short, believing the same to be true. She did not intend to plead justification. The statements complained of (being those given

above) were made and written *bona fide*, believing same to be true, and without any malice or ill feeling towards the plaintiff.

Jefferson, K.C., and *Bartley*, for the appellant (the plaintiff) :—

This is a very grave and serious case. An unfounded charge was recklessly made by this lady affecting the character of the plaintiff, and likely to deprive him of employment, to take away his means of earning his livelihood ; and after the re-weighing of the coal she persisted in her accusation of dishonesty. The plaintiff was bound to clear his character. This was an action which could not have been commenced in the Recorder's Court, and very strong grounds would be required to justify the case being taken out of the Superior Court in which it was properly instituted. The present case is one of a type which, in practice, this Court has uniformly refused to remit: *Mackim* v. *Aylmer* (1); *Harte* v. *Formby* (2).

R. F. Holmes, for the defendant (respondent):—

There are no grounds for interfering with the discretion of the learned Judge in the Court below. In *Harte* v. *Formby* (2) the employers, the Railway Company, required their servant, the plaintiff, to bring the action and obtain a verdict on pain of dismissal. Here it is plain that Messrs. Robinson were quite satisfied that the charge could not be sustained, and that the defendant had unfortunately acted in error. It is absurd to suggest that the defendant acted maliciously; she counted the bags as she thought accurately, and there was, as she believed, a shortage. The communications with the employer were clearly privileged. The plaintiff's character can be completely cleared in the Recorder's Court. He can be awarded any amount of damages the Recorder thinks he ought to get; and for a mistake which anyone might make, it would be hard to punish the defendant by muleting her in the costs of an action in the Superior Court, whatever be the result of the proceedings.

(1) 31 Ir. L. T. R. 33. (2) 36 Ir. L. T. R. 204.

Appeal. 1911.

FORAN v. ROCHE.

THE LORD CHANCELLOR :—

I am of opinion, and so is Lord Justice Holmes, that this action should not be remitted. It is not a sham action—an action brought without any foundation. The only defence is that of privilege. It is an action for libel and slander, one which could only be commenced in the Superior Court. It is not our practice to remit such cases to the County Court, except when we think very small damages or none at all would be awarded. Several cases have come before us from time to time where persons have been charged with fraud or criminal offences; and, where there has been a persistent repetition of such a charge, we have held that the plaintiff ought not to be deprived of his statutory right to retain the action in the Superior Court.

This Court so held in various cases—in *Harte* v. *Formby* (1); *Tracey* v. *Freeman* (2); and *M'Nally* v. *Sinclair* (3).

On the whole, following the practice we have laid down, and where the action is not bogus, I think it should not be taken from the proper jurisdiction where it was placed.

HOLMES, L.J. :—

We have remitted to the County Court actions of libel and slander when satisfied that the libel or slander was of a trifling character, and that it would have been better if the action had not been brought at all, or that, if it went to trial, small or only nominal damages would be obtained. But we have always refused to remit where a charge of fraud has been deliberately made and persisted in after evidence has been given that no fraud was committed. There may be a defence of privilege in this case, but that raises a question fit to be dealt with in the Superior Court. If the case came before me for the first time, I would refuse to remit the action, and I could not do so now, having regard to our decisions.

CHERRY, L.J. :—

I do not think that we ought to reverse the decision of the Court below in this case, or interfere with the discretion exercised

(1) 36 Ir. L. T. R. 204.
(2) Unreported, 2nd July, 1907.
(3) Unreported, 10th February, 1909.

by Kenny, J. All cases of libel and slander must depend on their own circumstances ; and I do not think any general principle can be laid down as to when they ought, or ought not, to be remitted, other than that laid down in the section itself, that the plaintiff is bound, if he has no visible means, and cannot give security for costs, to satisfy the Court that he has a cause of action "fit to be prosecuted in the Superior Court." He may have a good cause of action, and may have sustained some damage, but it does not necessarily follow, in my opinion, that the case should therefore be retained in the Superior Court. If the cause of action is a trifling one, and the amount of the damage sustained manifestly small, I think it ought to be remitted. In *Harte* v. *Formby* (1), Fitz Gibbon, L.J., laid down that the amount of damages likely to be recovered was only one element to be considered ; but he did not say, nor does the case itself decide, that it was not an important element. *Harte* v. *Formby* (1) was a very different case in its facts from the present one. The railway guard there was in a higher position than the present plaintiff, and he was compelled by his employers to bring an action to clear his character. The issue for him, therefore, was his whole future life. The permanent loss of his employment would have followed from his failure to recover a verdict, and hence the Court naturally considered that he had a cause of action "fit to be prosecuted in the Superior Court." Here the circumstances are entirely different. The man has not been dismissed, and his employers have shown no intention of dismissing him, whatever the result of the action may be. I cannot see what real damage the plaintiff has suffered, though, through an unfortunate mistake on the part of the lady, he has had the unpleasant experience (which many others have suffered without being able to obtain any redress) of being unjustly accused of dishonesty.

Solicitors for the plaintiff : *Hanmore, O'Beirne, & Co.*
Solicitor for the defendant : *William Roche.*

W. G.

(1) 36 Ir. L. T. R. 204.

Appeal.
1911.

April 28.
May 1, 12.

THE KING (AT THE PROSECUTION OF GERALD CLOHERTY) *v.* THE COUNTY COUNCIL OF THE COUNTY OF GALWAY (1).

Local Government—Expenses incurred by Clerk of the Peace in printing and advertising for "county purposes"—"County purposes" in section 142 of the Grand Jury Act (6 & 7 Wm. 4, c. 116)—Liability of County Council to provide for printing and advertising for "county purposes" (6 & 7 Wm. 4, c. 116, s. 142; 40 & 41 Vict. c. 56, s. 20, sub-s. 3.

The expenses incurred by the Clerk of the Peace in (1) Printing lists of Quarter Sessions; (2) advertising dates of Quarter Sessions; (3) printing licensing applications; (4) advertising appointments of civil-bill officers; (5) advertising of applications for compensation for criminal injuries; and (6) printing lists of civil-bill appeals to the Judges of Assize, are in the nature of expenses for county purposes, the presentment for and payment of which by the Grand Jury were lawful, but not compulsory, under section 142 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), and, as the third sub-section of section 20 of the County Officers and Courts (Ireland) Act, 1877, only empowered the continuance of presentments for, and payments of, such expenses, but did not render them compulsory, there is now no legal obligation on the County Council to make provision for their payment, although it is competent and proper for them to do so.

APPEAL from an order of the King's Bench Division (reported *supra*, p. 154) dated the 14th February, 1911, making absolute a conditional order for a mandamus directed to the appellants, the County Council of the county of Galway to enforce payment of the following expenses which had been incurred by the prosecutor, the Clerk of the Crown and Peace for the county of Galway, and the payment of which was resisted by the appellants:—(1) Printing lists of Quarter Sessions for posting; amount of expenses incurred, £1 8*s.*; (2) advertising dates of Quarter Sessions; amount, £5 16*s.*; (3) printing lists of applicants for licences; amount, £7 15*s.*; (4) advertising appointments and removals of

(1) Before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

civil-bill officers; amount, £6 1*s.* 7*d.*; (5) printing lists of notices of applications for compensation for criminal injuries; amount, 5*s.*; (6) printing lists of civil-bill appeals to the judges of assizes; amount, £6 15*s.*

Serjeant O'Brien, K.C., Clancy, K.C., and *Butler*, for the appellants:—

We submit that the judgment of the King's Bench Division, which makes the payment of the expenses in question by the several county councils in Ireland compulsory, cannot be sustained. By section 1 of the Grand Jury Act, 1836, it was rendered unlawful for any grand jury to make any presentment for raising any money (save in certain excepted cases) unless under the provisions of that Act, and, by section 127, all presentments not containing a reference to the chapter and section of the Act under which they are made are null and void. The effect of this statute was considered in *In re Presentments for Copying Jurors' Book*, Jebb, 216, and see *In re Caldbeck* (1). The provisions of the Local Government (Ir.) Act, 1898, against illegal payments are equally strong; see section 47. No section can be referred to authorizing the raising of money for any of these expenses. They are not included in the expenses of printing, which by section 47 of the Grand Jury Act, 1836, was to be executed by contract when the grand jury was authorized to make presentment for it, nor in the expenses of printing mentioned in section 142 of the same Act. The printing mentioned in the latter section, which section is repealed by the Local Government (Ir.) Act, 1898, schedule 11, which might be ordered by the Grand Jury or presentment sessions for any county purpose, can only include printing authorized by the Act. It is a fallacy to contend that the 142nd section of the Grand Jury Act gave a discretion to the Grand Jury to order printing not authorized by the Act, and that by section 20 (3) of 40 & 41 Vict. c. 56, payment by the Grand Jury for printing so ordered, which was formerly permissible, was made compulsory. Payments of any of the expenses in question by the Grand Jury, if made, were illegal payments, and

(1) 1 Cr. & D. 394.

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could not have become lawful by the payments being continued for a number of years. The concluding words of section 20 (3) cannot have the effect of a substantive enactment, but refer to the payments to Clerks of the Peace, in counties where a union of the offices of Clerk of the Crown and Clerk of the Peace had not taken place, of (1) expenses under the Juries Act so far as incurred in connexion with the duties thereby imposed on the Clerk of the Peace (34 & 35 Vict. c. 65, s. 16); (2) expenses incurred by him under the Registration of Voters Acts (13 & 14 Vict. c. 69, ss. 70–72); and (3) expenses of preparing and maintaining in Civil Bill Courthouses the table of fees payable to the sheriff (27 & 28 Vict. c. 99, s. 11).

That section 20 (3) of 40 & 41 Vict. c. 56, is an enabling section only is shown by the words "shall continue to be presented and paid in the same manner as heretofore," which clearly show that the expenses now in question, even if lawful before, which we deny, were not made compulsorily payable. We contend that these expenses should be defrayed, if necessary at all, either by the Treasury, or by the Clerks of the Peace themselves. The salaries of the latter were provided for by section 110 of the Grand Jury Act, 1836, and were expressly enacted to include remuneration "for their respective duties, services, and *expenses*." "Expenses" must include expenses necessarily incurred in the office of the Clerk of the Peace for county purposes. Section 110 is expressly re-enacted by clause 110 of the schedule to the P. C. Order of the 30th January, 1899. As regards the printing of licensing applications, printing is not mentioned in the Licensing Acts at all; as to the printing of lists of civil-bill appeals, there was no uniformity of practice in the various counties, and the expense of printing such lists has been greatly increased by statutes passed since 1877. The advertising of criminal injuries is an expense which was not even in existence at the date of the passing of 40 & 41 Vict. c. 56.

The Solicitor-General (*Charles A. O'Connor, K.C.*), *Serjeant Molony, K.C.*, and *John Linehan*, for the respondents:—

At the date of the passing of the Grand Jury Act, 1836, no one of the enactments under which these expenses were incurred

was in existence, save the Licensing (Ir.) Act, 1833, under section 2 of which it was necessary for the Clerk of the Peace to make out lists of applicants for licences and their sureties, and transmit same to the magistrates. There was no obligation on the Clerk of the Peace to print these lists, but if after the passing of the Grand Jury Act, 1836, any ratepayer had objected to the expenses of printing them being presented for as unauthorized, and the matter had come before the Judge of Assize, the latter would rightly have held that the printing of the lists—printing being more convenient and cheaper than copying—was an expense for a county purpose for which the Grand Jury could properly make a presentment. The practice of printing these lists continued down to the year 1877, and by sect. 20 (3) of 40 & 41 Vict. c. 56, the expenses of printing these lists, being sums then legally "presentable or payable," were directed to continue to be presented and paid in the same manner as theretofore. By sect. 16 of 14 & 15 Vict. c. 57, the name and place of abode of every civil-bill officer already appointed, or thereafter to be appointed, to serve processes is directed to be published. Here there is no obligation imposed on the Clerk of the Peace at all, but if he is not to do the work, the county must do it; this is clearly a county purpose, and here again no ratepayer could be heard to object to a presentment for the expense of printing the lists as unauthorized. We do not contend that section 142 authorized a Grand Jury to present for any purpose, but it clearly recognizes their right to present for lawful county purposes, and the continuation of such presentments is provided for by sect. 20 (3) of 40 & 41 Vict. c. 56. The same observations apply to the printing and advertising of the lists and dates of Quarter Sessions under sect. 21 of 14 & 15 Vict. c. 57; this work must be done, and the publication of written lists would satisfy the section, but printing is clearly more advantageous, and the expense of printing the lists was properly presented for, for the benefit of the county at large. That the expenses of such county purposes were intended to be provided for by presentment by the Grand Jury is shown by sect. 155 of 14 & 15 Vict. c. 57. It must be borne in mind that Clerks of the Crown are "county officers"; see Schedule S to the Grand Jury Act, 1836. There is no obligation on any person

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to print the lists of civil-bill appeals, but the printing of them is of the greatest advantage to Judges of Assize, practitioners, and the public generally; clearly the Grand Jury could have come to the conclusion that the printing of these lists was for the advantage of the county, and that the expense of so doing was properly presentable. The printing in connexion with criminal injuries is no doubt different from what it was before the Grand Jury business respecting compensation for malicious injuries was transferred to the County Court, but the necessary printing is for the same purpose, and, that being a county purpose, the expense should be borne by the county. It would be unfair to cast these expenses on the Clerk of the Peace, as is sought to be done by the appellants; the expenses referred to in section 110 of the Grand Jury Act are clearly the personal expenses of the Clerk of the Peace, and do not include those now in question. We do not contend that these payments became lawful because continued for so long a period, but we do say that section 20 (3) of 40 & 41 Vict. c. 56, can be construed "not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when the Act was passed" (see judgment of Thesiger, L.J., in *Yewens* v. *Oakes* (1)), and that the intention of the Legislature was that all these sums, which were in fact payable and presentable in 1877, should continue to be so paid and presented.

May 12.

THE LORD CHANCELLOR:—

This is an appeal by the County Council of the County of the Town of Galway against an order of the King's Bench Division made at the prosecution of Mr. Cloherty, Clerk of the Crown and Peace for the County of Galway, directing a peremptory mandamus to issue, commanding them to make all due and necessary provisions for the payment to him as such county officer of sums amounting in all to £28 0*s*. 7*d*., representing the tot of six items specified in the affidavit of Mr. Cloherty.

The items are the following:—

1. Printing lists of Quarter Sessions for posting; amount of expenses incurred, £1 8*s*.

(1) 6 Q. B. D. 530, at 535.

2. Advertising dates of Quarter Sessions; amount, £5 16*s.*

3. Printing list of applicants for licences; amount, £7 15*s.*

4. Advertising appointment and removal of civil-bill officers; amount, £6 1*s.* 7*d.*

5. Printing lists of notices of applications for compensation for criminal injuries; amount, 5*s.*

6. Printing lists of civil-bill appeals to the Judge of Assizes; amount, £6 15*s.*

Taking up these items seriatim, and omitting for a moment the question of printing as distinct from writing, there was a plain duty on the County Officer—the Clerk of the Peace, or Clerk of the Crown and Peace as he might be—to publish, or give notice, or promulgate what is contained in items 1, 2, and 4. This obligation and duty are derived from the 14 & 15 Vict. c. 57, which contains provisions giving directions on these subjects. Then, as regards item 3, the duty of publishing and giving information is specifically derived from the Licensing Act, 3 & 4 Wm. 4, c. 68. Then item 5 was somewhat differently circumstanced in this respect, that originally claims for compensation for malicious injuries came before the Grand Jury, and were presented for by it. This jurisdiction was transferred to the County Court Judge by the Local Government Act, and the County Council is made the body to present for this payment.

Now, as regards all six items, it is proved that all these expenses (I leave out of account printing for the moment) were presented by the Grand Jury, and from the time the powers and duties of the Grand Jury were transferred to the County Councils were regularly presented for and paid by them down to October, 1909. I am not including in that the 5*s.* item. It was said that this long-established practice created an obligation which cannot now be questioned by the County Councils, but I do not think that argument can prevail, especially as there are prohibitive words in the Act of 1898 against making payments not authorized, and, in my opinion, we must find legislative sanction before we find absolute liability apart from discretion and power; legality is one thing, but legal obligation is another. The important provision in the Grand Jury Act of 1836 is section 142, and it is necessary to come to a conclusion on the true construction of that before we approach the

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sections in any subsequent statute. [His Lordship read section 142.] Now, I am of opinion that all the items we have to deal with are for a county purpose; but was it obligatory to present? The distinction between peremptory presentments and those not peremptory but yet lawful is well known; and, in my opinion, those mentioned in section 142 are not peremptory, but ones which it was lawful for the Grand Jury to make, and, I will add, natural and reasonable they would make if for a county purpose, and so here during the long period to 1877—forty years—they were made.

In 1877 a great change occurred in the position of Clerks of the Crown and Peace, which came into full operation after the union of the offices of Clerk of the Crown and Clerk of the Peace became an accomplished fact.

The counties were released from the payment of the salaries and fees payable to these officers. The salaries fixed in the manner provided became payable by the Treasury, and the Treasury took over the fees theretofore receivable by the officers. No provision is made for the payment to the officers of any expenses which might be incurred by the officers in the performance of the work included in the items in question here. Section 15 of this Act does not cover them. It only provides that "The Treasury may from time to time direct that such annual or other allowance as they shall think proper shall be made to any existing officer or person appointed under this Act for defraying the expense of necessary clerical assistance, postage, books, stationery, and other requisites of his office."

Section 20, sub-section 3, is the provision mainly relied on by the prosecutor. It enacts [His Lordship read the section].

I think the plain meaning of the concluding words of the sub-section is that presentment other than for the salaries and remuneration shall go as before. It is a sort of saving clause and not a new enactment. They would not be presented and paid "in the same manner as heretofore" if they became imperative presentments. I express no opinion as to what the result will be if a Judge of Assize orders the printing.

It is of great importance in reference to the question raised by the prosecutor to remember that in two special cases expenses

and remuneration of the Clerks of the Peace in reference to the registration of voters and the jurors' lists were directed to be the subject of imperative presentments. [His Lordship read the clauses of section 21.] The scales fixed by the Lord Lieutenant under Orders in Council carry out the legislation. The Legislature did not contemplate that the Grand Juries after section 20 of the Act of 1877 became law would not present for county purposes as they had done before.

The Act of 1898 transferred to the County Councils all the powers and duties of the Grand Juries, and what had been legal for the Grand Juries to do continued to be legal on the part of the County Councils, and since 1877 and to October, 1909, Grand Juries and County Councils continued as before to make presentments for county purposes. It was not obligatory on them to do it, but they recognized the benefit which the public and the practitioners and the administration of justice gained by the making of such presentments, and the inconvenience which would result if they were not made and the Treasury declined, as they might, to pay out of public funds.

We were pressed with an argument that printing was not mentioned in any of the sections relied on. If that were the only point in the case, I would not yield to it, as I think the question is whether the expense of giving publicity to the matters in question by promulgation and public notice should be paid for, and the mode in which it should be done, whether by manuscript or typing or printing, is quite immaterial. Printing now-a-days is the more usual and generally the more economical method of advertising and giving notice.

I am quite sensible that many of the observations I have made do not apply to the 5*s.* charge for printing lists of notices of applications for compensation for criminal injuries, as the necessity only arose recently; but such printing is really for the benefit of the ratepayers and County Councils themselves.

Upon the whole I am of opinion that the cause shown against the conditional order for mandamus should be allowed; but, having regard to the date at which this opposition has been started, and all the circumstances, no costs should be given either in this Court or the King's Bench Division.

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HOLMES, L.J.:—

I concur. I am of opinion that sect. 142 of 6 & 7 Wm. 4, c. 116, gave authority to a Grand Jury to present such sums of money as were necessary for printing, either as an advertisement in newspapers or in any other way, not only where the printing was carried out by the Clerk of the Peace under statutory provisions, but also all other printing which was ordered by the Judge of Assize or by the Grand Jury itself, or by Presentment Sessions for any county purpose. This was the law down to the passing of the County Officers and Courts (Ir.) Act, 1877. The presentments to be made under section 142 were not what are known as compulsory presentments, except perhaps where the printing was done under the order of the Judge of Assize. They were presentments as to which the Grand Jury was to exercise its discretion, and to decide whether the printing was properly required for a county purpose.

The Act of 1877 changed the position of the Clerk of the Peace. It united his office on the first vacancy with the Clerkship of the Crown; and the salary was to be paid out of the Exchequer, which was thenceforth to receive all fees theretofore payable to the holder of either office, and to pay the new officer an allowance for his office expenses.

Then comes a proviso to be found at the end of section 20: "Notwithstanding the union of the offices..., and both before and after such union, all sums now presentable or payable, other than such salaries or remuneration, shall continue to be presented and paid in the same manner as heretofore." I have no doubt that the object and effect of this provision were to preserve the right of the officer to continue to receive for his own use such sums as the Grand Jury might present under such an authority as was conferred on it by section 142 of the Act of 1836.

The sole question in the present appeal is whether this proviso had the effect of converting what had been theretofore a discretionary into a compulsory presentment. I am of opinion that it did not. The language clearly expresses that it is to continue to be presented *and paid in the same manner as theretofore.* The transfer of the duties and functions of Grand Juries to County

Councils by the Local Government (Ireland) Act, 1898, left the law as to providing money for county printing in the same position. I attach no importance to the repeal of section 142, inasmuch as it was kept in force by section 20 of the Act of 1877, which is unrepealed.

As a matter of fact the money required for the printing mentioned in the writ of mandamus has been provided until recently by the Grand Jury and County Council for many years in County Galway, and I believe in the great majority of other counties.

This is, doubtless, evidence that it was wise and prudent in these bodies to make the payments, but it does not take away their discretion. Therefore, the order appealed from must be reversed, and the cause shown against the conditional order allowed.

To prevent any misunderstanding, I desire to say that the County Council can legally present for the sums in question, although not bound to do so; that no other authority is so bound; and that if they are not provided by the County Council, this kind of printing will cease altogether. I also desire to reserve the consideration of what the law would be if the printing were ordered by the Judge of Assize. This, I think, might involve different considerations, but it does not now arise.

CHERRY, L.J.:—

The decision of the King's Bench Division directing a writ of mandamus to issue in this case is based partly upon statute law, and partly upon the practice which has prevailed for many years in every county in Ireland, for the Grand Jury and for the County Council, as their successors, to defray the charges which the County Council of the County of Galway now refuse to pay. So far as the claim of the Clerk of the Peace is based upon custom, I think the County Council have a perfect answer in the provisions of sub-section 2 of section 47 of the Local Government Act, 1898; that section provides that a Council "shall not *directly or indirectly* apply any part of their county or district fund, or any moneys under their control, for any purpose not authorized by this or

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any other Act," and I do not think that any length of time during which payments not authorized by this section have been made could render them now legal. Moreover, the County Councils did not come into existence until 1899, and twelve years is a short period upon which to ground a prescriptive right as against them, even if it were not at variance with the statute regulating their duties. I am, therefore, clearly of opinion that if this order is to be sustained, it must be by virtue of the several statutes to which Wright, J., refers in his judgment, and not upon any ground of custom or convenience. Whatever inconvenience it may cause for the County Council to refuse to pay these accounts for printing and advertising, it is, in my opinion, within their right to refuse to pay unless some section of an Act of Parliament directly imposes upon them the obligation to discharge them. Two sections are relied upon by the prosecutor, and form the ground of the judgment of Wright, J., namely, the 142nd section of the Grand Jury Act (16 & 17 Wm. 4, c. 115) and the 20th section of the County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56). The former section has been repealed by the Local Government Act, 1898, but the contention of the prosecutor is that the 3rd sub-section of the latter section keeps it alive for the purposes referred to in that section.

I have no doubt that the 142nd section of the Grand Jury Act was a general authorization to the Grand Jury to defray the ordinary expenses of printing of the Clerk of the Peace, whether that printing was done in obedience to the directions of some Act of Parliament or Rule, or whether, as in the case of lists of civil-bill appeals, it was only done as a matter of general convenience. The Clerk of the Peace was, undoubtedly, prior to the passing of the County Officers and Courts Act, 1877, a County Officer. He is so described in the Grand Jury Act itself, and the printing of lists of Quarter Sessions, Licensing Applications, and the other items now in question were undoubtedly such as would reasonably be described as being done for a "county purpose."

But though the Grand Jury may have been authorized to pay for this printing (I pass by, for the present, the distinction raised by Mr. Clancy between printing and advertising), could any lawyer contend that they were bound in law to do so? I do

not think so, and it was not for a moment so contended by the Solicitor-General in this case. The very vagueness of the phrase, "any county purpose" shows, if the language of the section itself in other respects did not do so, that the Grand Jury (save so far as the printing was required under the provisions of their own Act, or some other statute directly imposing upon them the duty to present for the expenses of printing) were themselves to determine what printing should or should not be paid for, as having been executed for a "county purpose."

To get over this difficulty, as well as that arising from the fact that the 142nd section of the Grand Jury Act has been repealed, reliance is placed upon section 20 (3) of the County Officers and Courts (Ireland) Act, 1877. And it is upon the provisions of this sub-section that the question mainly turns, for, unless we can find in it some provision of a mandatory character, requiring the payment out of the county rates of the items now in dispute, I cannot see that there is any statutory provision which can possibly be relied upon compelling the County Council to pay them.

A change was made in the status of the Clerk of the Peace by the County Officers and Courts (Ireland) Act, 1877. It was provided that the office should be united to that of the Clerk of the Crown, and that, after the union of the two offices, the salary was no longer to be presented for, as formerly, by the Grand Jury, but was to be paid by the Treasury out of moneys to be provided by Parliament, the Treasury taking as a set-off against such liability the fees formerly received by the Clerk of the Peace. The 20th section, which provides for this charge, concludes with the words: "But notwithstanding the union of the offices of Clerk of the Crown and Clerk of the Peace, and both before and after such union, all sums now presentable or payable, other than such salaries or remuneration, shall continue to be presented and paid in the same manner as heretofore."

Serjeant O'Brien argued, with much force, that this provision was only a saving clause to provide for the payment for printing under the Registration of Voters Acts and the Juries Acts, in the same manner as had previously been done; the presentment and payment of such sums as were required for these purposes by

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the Grand Jury being clearly mandatory under the terms of the Acts so directing their payment. But I do not think this can be so, for the very next section (the 21st) of the Act, in express terms, provides for the continuance of the presentment for these expenses. The concluding words of section 20 must therefore refer to some other expenses in connexion with the office of Clerk of the Peace, and what other expenses can they refer to, except such as were incurred under the 142nd section of the Grand Jury Act for printing? Office expenses, clerical assistance, postage, books and stationery had already been provided for by the 15th section, and the Treasury was to defray these. I therefore come to the conclusion that the concluding words of section 20 refer to payments and presentments made under the 142nd section of the Grand Jury Act for printing for "county purposes," and that Parliament intended that the same system of presentment for such expenses should continue in the future as in the past, notwithstanding the change in the position of the Clerk of the Peace. As this 20th section is not repealed, I do not think that the repeal of the 142nd section of the Grand Jury Act makes any difference as to these payments, which, in my opinion, may now be legally made by the County Council, as they were by the Grand Juries between 1877 and 1899.

But the prosecutor is bound to go a step beyond this. He is bound to show, not only that these payments may be made, but that they must be made, by the County Council. It is here, in my opinion, that his case hopelessly fails. There can be no doubt, I think, that under the 142nd section of the Grand Jury Act, before the passing of the County Officers and Courts Act, there was no obligation on the Grand Jury to provide for these expenses. What is there in the latter Act to indicate any change in this respect? The 20th section merely provides that such sums "shall continue to be presented and paid in the same manner as heretofore." Every word and phrase in this sentence indicates that there was to be no change in the character of the presentments. The words "continue," "in the same manner," "as heretofore," are utterly inappropriate if a momentous alteration was to be made depriving the Grand Jury of the discretion

which they were previously entitled to exercise as to these payments.

Again, if this sub-section is to be deemed to have imposed a duty on the Grand Jury, how is the extent of that duty to be determined? Printing, "for any county purpose," in the words of the 142nd section of the Grand Jury Act, is a phrase studiously vague. The practice may have varied, and most probably did vary, in different counties, as to what printing should be done at the expense of the county. Is it argued that it was mandatory to continue in each county exactly the same printing as was done in the year 1877? or that some general average result is to be arrived at? or that any printing which the Clerk of the Peace chooses to call for is to be paid for by the county? All these difficulties are got rid of if the section is read as, in my opinion, it can only grammatically be read, as merely enabling the Grand Jury to present for printing in connexion with the Clerk of the Peace's office in the same manner as they had previously done when that official was clearly and undisputably one of their own officers.

When the Legislature desired to make presentments for printing mandatory, very different language was used from that to be found in this section. Thus the Juries (Ireland) Act, 1877 (34 & 35 Vict. c. 65), provides by s. 16 that "it shall be lawful for the Grand Jury of every County, and for every Town Council empowered to make presentment, as the case may be, from time to time at the next ensuing Assizes or Presenting Term, *and they are hereby required* without previous application at Presentment Sessions, or otherwise, to present all such sums of money as they shall deem reasonable and necessary for defraying the expense of any printing done in pursuance of this Act." Exactly similar language is used as to presentments for printing lists of voters in 13 & 14 Vict. c. 69, section 70 of which provides that the Grand Juries "*are hereby required to present*" the cost of printing these lists. The language of section 142 of the Grand Jury Act and section 20 of the County Officers and Courts Act is quite different, and did not, in my opinion, impose any legal obligation on the Grand Jury to present for the cost of printing in connexion with the office of the Clerk of the Peace generally, in the way it is here

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contended. I therefore agree with the other members of the Court in holding that there is now no legal obligation upon the County Council to pay for this printing, and that consequently the cause shown against the order for a writ of mandamus should be allowed.

Having arrived at this conclusion, it is unnecessary, in my opinion, to determine the interesting questions raised as to the extent to which the County Council may legally pay the items claimed in this case, even though they may not be bound to do so. Mr. Clancy drew a distinction between "printing" and "advertising," and contended that, even admitting that payment for the former was warranted by the statutes relied upon, payment for advertisements in newspapers, *i.e.* the 2nd, 4th, and 5th items of the claim in this case, could not be included, and that the County Council could not legally pay this, even though willing to do so. It may be argued on the one hand that, inasmuch as all advertisements in newspapers are printed, they necessarily come within the scope of the general term "printing," and, on the other hand, it may be said that the 142nd section of the Grand Jury Act evidently referred only to the printing of reports, notices, and other documents connected with the business of the county, and not to advertisements in newspapers. However this may be, I think it better to express no opinion upon the question, but to leave it open for determination whenever any ratepayer objects to a payment out of the rates voluntarily made by a County Council for any of these purposes.

Solicitor for the appellants: *John Kilkelly.*
Solicitor for the prosecutor: *Malachy Kelly.*

R. ST. J. C.

ISABELLA BOYLE *v.* J. B. FERGUSON, LIMITED (1).

(1909. No. 10949.)

K. B. Div. 1911. Jan. 18, 19, 30.

Master and servant—Negligence of servant—Scope of employment—Servant having general authority to take out motor-cars belonging to his master.

I., who was the manager of the department for the sale of second-hand cars in the business of F. & Co., a firm of motor engineers, while driving on a Saturday evening, at about 7 p.m., accompanied by two ladies, in a second-hand motor-car belonging to F. and Co., ran over and killed G. B. In an action taken by G. B.'s widow against F. & Co., under Lord Campbell's Act (2), for negligence of I., evidence was given that I. frequently took out second-hand cars from the department of the business of which he was the manager without accounting to anyone for so doing, and that the petrol used by I. in so taking out these cars was charged to the second-hand department of the business. I. admitted that he took out the cars without accounting for so doing, and, in his evidence at the trial, stated that his being on the road gave him better opportunities for doing business for the firm; that on one or two occasions, of which that of the accident was not one, he had himself paid for the petrol he used in taking out the cars, but that upon the occasion of the accident he was driving solely for his own pleasure. The jury found that at the time of the accident I. was acting within the scope of his employment as the servant of F. & Co.

Held, that there was evidence to justify the verdict of the jury, that I. was acting within the scope of his employment so as to render F. & Co. liable for his negligence.

Quære: Whether, where a servant has a general authority to take out his master's vehicles, not only for the purposes of the master, but also for his own pleasure, it is to be inferred that every user of the vehicles under such general authority is a user by the servant as such within the scope of his employment?

NEW TRIAL MOTION.

The action, which was tried at Belfast, at the Summer Assizes, on the 2nd of August, 1910, before Dodd, J., and a special jury of the county and city of Belfast, was brought by the plaintiff,

(1) Before PALLES, C.B., and GIBSON, J. (2) 9 & 10 Vict. c. 93.

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widow of George Boyle, under Lord Campbell's Act (1), against the defendants, a firm of Automobile Engineers and Motor Agents, for negligence causing the death of George Boyle, plaintiff's husband, by the servant of the defendants when driving a motor-car.

The following matters of fact, material to this report, were proved at the trial of the action, and were set out in the report of the learned Judge who tried the case.

Upon the evidence it appeared that the plaintiff's husband, George Boyle, was struck and knocked down by a motor-car, the property of the defendants, on the evening of Saturday, the 11th of September, 1909, at about 7 p.m., in Manor Street, Belfast. The injuries caused to the plaintiff's husband by the accident resulted in death. The car was, on the occasion of the accident, driven by a Mr. Ireton, an employee of the defendants, who was accompanied by two ladies.

On the question whether Mr. Ireton was at the time of the accident acting within the scope of his employment as the defendants' servant, the following evidence was given :—

Duncan Cameron, examined on behalf of the plaintiff, stated, "I was at one time in employment of defendants, in March, 1908, viz., one year and nine months. I was a motor-painter. . . . There was a second-hand department, from six to ten cars. Mr. Ireton had charge of that department. I never knew of Mr. Ireton's time being recorded. He would take them out two or three a day. He went out at all hours, and I have known him to take out cars for days and weeks. I have known him to take out a car and return without the car."

David Morrison, examined on behalf of the plaintiff, stated, "I was in employment of defendants in January, 1908, as carriage yardman and washer in the second-hand department. There were six or eight cars, sometimes more. Mr. Ireton had control over that department. I never got orders or instructions from anyone but Mr. Ireton about second-hand cars. When Ireton took a car, no note was taken. In other cases a docket was given. . . In Ireton's case the petrol was charged to second-hand department. I wrote out a docket. Ireton frequently took out these second-hand cars.

(1) 9 & 10 Vict. c. 93.

I have seen him taking them out on week-days, on Saturdays after hours, and on Sundays. About the trip to Rathfriland (1), I remember, Mr. Ireton took a car away. I polished it up. It never came back. Mr. Ireton came and went as he wished. He had no regular hours."

Samuel S. Cowden, examined on behalf of the plaintiff, stated: "I was from the 1st April, 1908, to 5th March, Garage Manager. There were six to ten cars in the hiring department. I negotiated for sale of a car to Mr. Kelly. Ireton was away; I carried on the negotiation; Ireton had control. Mr. Ireton's whole business was to act as salesman of second-hand cars." Asked if Mr. Ireton took out the cars, the witness replied "he did; he demonstrated powers of car to Mr. Kelly." (The question was objected to by counsel for the defendants.)

Robert William Ireton, the driver of the car which collided with the plaintiff's husband, examined on behalf of the defendants, stated: "I have been driving motor-cars since 1901, constantly driving. I owned motor-cars of my own. I went into Ferguson's, August, 1907. I was in charge of the works. About eight months after, I was appointed in charge of the sale of second-hand cars: I had other duties. I had authority to take the cars out whenever I liked, and bring them back whenever I liked, without giving any statement to my employers of why I was taking them out. On this Saturday evening the place did not really close. The garage is open day and night. The workers had gone at one o'clock, but there was one man in charge of the garage. Mr. Ferguson is the managing director. He left at three o'clock. He exercises general control and supervision. He had gone to his father's place in the country. My work for the day was over. I took out a car about four o'clock."

Asked by counsel for what purpose he took out the car, the witness replied, "I took it for a drive. I had no business in view either for Fergusons or for myself. I took car up to my own place. I knew two young ladies called Carson. I called for them. I took them with me in the motor for a drive. I went

(1) It was stated that Mr. Ireton, on the occasion of an outing at Rathfriland, had sold a car belonging to the defendants which he had driven to Rathfriland.—REP.

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to Bangor and Donaghadee. I had nothing in my mind but pleasure, when I was coming from Bangor to Donaghadee. I had never stopped. We were wanting to get on Newtownards Road, which would have brought us back to Belfast."

On cross-examination, the witness stated, "I at one time was in entire charge of the whole works; no one interfered with me in the management. I would go on long expeditions through the country. I was in the habit of going out at all times and at all hours, and that with a view of pressing the business of the defendants. I found from my experience being on the road gave me an opportunity of doing business I had not when I was in the garage. I seized any opportunity that came in my way of selling second-hand cars and new ones. If I had met a disabled car, I would do my best to bring it to the firm, and the question when I would take the cars out, or what I would do with them, was left entirely to my charge. The petrol used on the occasion in question was paid for by the Company. There have been occasions, two or three, when I paid for the petrol myself. The occasion on which I paid for the petrol would be when I was using the cars for my own purpose. No sentimental element in the Carson family. I had sold a motor-car to a first cousin of the Carsons. Miss Carson belonged to a wealthy family, a good deal of money, ladies competent to buy motors. . . I had no particular hours of work. I meant I had given up all work for the day."

Mr. Ferguson, examined on behalf of the defendants, stated, "I am managing director of J. B. Ferguson, Limited, Motor Engineers, Chichester Street, Belfast. Second-hand cars a separate branch, all under my control. I would hand them to Ireton. I had no knowledge of the excursion on Saturday. It had nothing to say to my business. I did not know the ladies. I had never been in negotiation with them about a motor-car."

On cross-examination, the witness stated, "I sell some second-hand cars myself. Part of Ireton's duty is to create opportunities of selling. He had full authority to take out a car, Sunday or Saturday. Petrol charged against the car. I left it entirely to himself; I had absolute confidence in him. I have known him to go out with a car, and come back with a cheque. If he had met a purchaser, he had full power to dispose of it."

In reply to counsel, the witness stated, "On this particular evening, so far as I know, he was not on any business"; and, in reply to a question whether, upon that evening or since, any business or business negotiations had been reported to him or to his company as a result of that trip, or did any such in fact result, the witness replied in the negative.

Miss Annie Carson, one of the ladies with Mr. Ireton on the occasion of the accident, examined on behalf of the defendant, stated, "I know Mr. Ireton. I have known him three or four years. I remember Saturday. We had made no arrangement. He called and offered a run in car."

Cross-examined, the witness stated, "I was often with him before, week-days and Saturdays. The Carsons are a good motor connexion. He did not transact any business. My cousin bought a car two years ago." In answer to a question by the learned Judge, the witness stated, "I was on the trip to Rathfriland when he was selling the car to Mr. M'Spadden, solicitor. There were a lot of friends there; three others to whom he sold cars. This was two years ago, and I know it was a business transaction."

Mr. Campbell asked for a direction on the ground that there was no evidence of Ireton being acting within the scope of his employment; but the learned Judge declined to direct.

The following questions were left to the jury, and were all answered by them in the affirmative:—

(1) Whether the death of the deceased was caused by the negligence of the driver Ireton—(*a*) in driving too fast, (*b*) in not giving sufficient notice of his approach, (*c*) in entering into Manor Street in the manner in which he did without having due regard for the safety of persons who might reasonably be expected to be on the said street.

(2) Whether at the time of the occurrence the driver Ireton was acting within the scope of his employment as servant of the defendants.

(3) In answer to the third question left to them, namely, What damages do you award to the plaintiff, proportioned to the injury resulting from the death of George Boyle? the jury found the damages at £400.

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On these findings the learned Judge gave judgment for the plaintiff for £400 and costs, execution thereof being stayed till the second day of the ensuing sittings; and, in the event of the defendants serving notice of motion for a new trial, or otherwise impeaching the verdict, to be further stayed until such motion should be disposed of by the King's Bench Division, the time for moving being extended to the second day of the ensuing sittings.

On the 22nd of October, 1910, the defendants served the following notice of motion:—

"For an order that the judgment for the plaintiff entered in this action be set aside on the ground that the finding of the jury, 'that the driver, Ireton, was at the time of the occurrence acting within the scope of his employment as a servant of the defendants,' was against evidence and the weight of evidence, and on the ground of misdirection by the learned Judge in connexion with the said question, and for an order that judgment with costs, including the costs of this application, be entered for the defendants."

It did not appear from the report of the learned Judge that any objection had been taken to his charge to the jury.

The Right Hon. James H. M. Campbell, K.C. (with him, *Henry Hanna*), for the defendants:—

The learned Judge should have directed the jury as to the scope of Ireton's employment. The strongest case against the defendants is, that Ireton when out on pleasure might also do business for his firm. If it was part of his employment to advertise the cars, he was not doing this at the time when the accident occurred; and even supposing he had a general authority in respect of the cars, upon the evidence, he was not exercising that authority at the time of the accident: *Cormack* v. *Digby* (1); *M'Cann* v. *Millfield Co.* (2). Assuming that Ireton might have done business on the trip, there is no evidence that he did any, or intended to do any, upon this trip. He stopped nowhere; it was on a Saturday and in the evening; the working day was over. If the real question for the jury was whether

(1) I. R. 9 C. L. 557. (2) [1908] Unreported.

Ireton upon the occasion of the accident was acting within the scope of his employment, the evidence is all one way; no business resulted from the trip; the ladies say they were asked to go out for a drive: they went with Ireton, and they say that no business was attempted by him during the trip. This evidence is not contradicted, and it is plain that the trip was taken solely for Ireton's pleasure.

Bates, *K.C.*, and *James Chambers*, *K.C.* (with them, *W. H. Brown*), for the plaintiff:—

The question for the Court is whether there is evidence to support the finding of the jury that Ireton was acting within the scope of his employment. *Prima facie* the defendants are liable for the acts of Ireton, their servant. That liability is sought to be avoided in the case by evidence that Ireton was out for his own pleasure when the accident took place, and reliance is placed upon the evidence that it was Saturday evening, and that ladies were in the car: but Ireton's employment was, in its nature, peculiar. Saturdays had no special significance for him; he took out the cars upon Saturdays, Sundays, and other days; the ladies, as is shown by the evidence of Miss Annie Carson, were out with him on week-days also, and they had been associated with him when he had done business on a trip. The cases where the master escapes from liability for the acts of his servant are cases where the act is without the scope of the servant's employment, or where there is some special licence. It would be difficult to find a case where if the act is within the scope of the servant's employment, the master can escape liability through the intention of the servant in doing the act. In the cases where a servant is directed to take a vehicle to a particular place, the authority ceases to exist where the servant goes off to some other place. Here the act done by the servant, Ireton, was clearly an act authorized by his employers. Ireton says that he had no fixed hours for work. The directors must be presumed to be the best judges of their business, and the scope of a servant's employment must be determined by his employers; Ireton was left at large. Advertising was part of his business; he could go over all the country; the ladies were good motor customers. The only

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factor that distinguishes the trip on the fatal occasion from other trips is Ireton's contradiction that it was taken by him as servant of the defendants.

Hanna, in reply :—

All that the evidence shows is that Ireton was granted a right to take out the cars; this liberty was no part of the original terms of his employment. The whole question is whether Ireton at the time of the accident was doing an act on behalf of the defendants: *Gracey* v. *Belfast Tramways Co.* (1) is the converse of the present case. Here the primary object of Ireton in taking the trip was pleasure: he might after setting out for pleasure have done business, but the evidence is that he did not. The jury had no right to regard the permission as to the taking out of the cars as part of the terms of Ireton's employment; it was merely a permission to do an act for the doing of which he would without such permission have been dismissed; it was a licence and nothing more: *Smith* v. *Lancashire and Yorkshire Railway Co.* (2).

PALLES, C.B. :—

Jan. 30.

Two questions only have been argued—(1) That Mr. Justice Dodd misdirected the jury by leaving the case for their consideration instead of directing them to find a verdict for the defendants on the ground that there was no evidence that Ireton, the chauffeur, in driving the motor-car on the occasion in question, was acting as the servant of the defendants; (2) that at all events the verdict was against the weight of the evidence. I am against the defendants on both questions. Admittedly, Ireton was at the time of the accident the servant of the defendants, and it was part of his duty as such servant to drive the car. This alone is sufficient *prima facie* evidence that on the particular occasion he was acting within the scope of his authority as servant, and threw upon the defendants the onus of rebutting to the satisfaction of the jury that *prima facie* inference (see *per* Lord Loreburn, Lord Chancellor, in *O'Reilly* v. *M'Call* (3)). There was therefore no misdirection.

(1) [1901] 2 I. R. 322.
(2) [1899] 1 Q. B. 141.
(3) [1910] 2 I. R. 70.

As to the second question. Ireton was in charge of the sale department of defendants' second-hand cars. He had authority to take out any second-hand car whenever he thought proper. He himself says, "I was in the habit of going out at all times and at all hours." He so went out with a view to pressing the business of the defendant. "I found from my experience that being on the road gave me an opportunity of doing business which I had not when I was in the garage. I seized any opportunity that came in my way of selling second-hand cars and new ones. If I had met a disabled car, I would do my best to bring it to the firm."

Then the petrol used on the occasion was paid for by the defendants, although on two or three occasions, when he was using the cars for his own purposes, he paid for the petrol himself.

I do not entertain any doubt that it was well within the province of the jury to find that Ireton was driving the car on the occasion in question, in accordance with his usual habit, with a view to and with the purpose of pressing the defendants' business, which, according to his own statement, he had a more effective opportunity of doing on the road than in the garage—a purpose which could be effected as well, if indeed not better, when two young ladies were with him in the car. Not only was it well within the province of the jury to draw this inference from Ireton's evidence, but I am inclined to say that I should have myself drawn it had I been the tribunal to determine the fact.

Had the evidence not been so strong in favour of the plaintiff, some other considerations might possibly have arisen; but as they were not urged at the hearing, I do not refer to them.

The verdict must stand, and the motion to set it aside will be refused with costs.

I express no opinion on the question whether the scope of employment of a servant must not, as a matter of law, be (or, at least, may not be inferred by a jury, as a matter of fact, to be) as extensive as the authority given to the servant, so that, when a servant is authorized by his master to use his car, as well for his (the servant's) own purposes, as for those of his master, *every* user of the car by the servant must be deemed to be a user of it *as servant*, upon which the master is responsible—a question which was argued before us, but to which I refer only to show that it has not been overlooked.

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GIBSON, J.:—

The point raised in this case is a novel and an interesting one, being outside any direct authority. Two propositions were contended—(1) Negligence on a journey undertaken for a driver's own purposes, without his employer's sanction, or on a journey with a vehicle lent to a man as a bailee, could not be imputed to the owner, as the driver would not in either case be acting as servant in the course of duty as such; and (2) if a servant, while driving in the course of duty, incidentally used the vehicle for his own purposes—as by making a detour to visit a friend—the master will be liable for the servant's negligence in the course of such detour, notwithstanding that it was made without his master's sanction, and had no connexion with his master's business. The detour cases have some bearing on the present contention. If Ireton, starting on a business round, had ended it with a pleasure run, or if, beginning with pleasure, he ended with business, would not the entire journey be attributed to his character of servant?

The facts here are very special. Ireton had uncontrolled discretion as to the user of the defendants' cars. He took them out, brought them in, and sold them without interference. He drove them with a view to sale, and to attract business, and though he sometimes used them for relaxation, the user, from his employers' point of view, was intended mainly and primarily to be for business purposes. Hence the petrol was charged to the defendants' account, though on two or three occasions, of which that of the accident was not one, Ireton, when he was driving for his own purposes, was debited. *Prima facie* on the day of the accident he was in control of the car as his employers' representative, and not as a bailee or borrower. Defendants' case is, that on that day Ireton's sole object was pleasure wholly unconnected with the defendants' business. This entirely depends upon Ireton's evidence as to his mental state—pre-eminently a jury question. The presence of the ladies is a material fact: they were interested in motors, and would be useful as patrons or supporters. He might take out the car for advertisement or show purpose, and might have invited the Misses Carson to strengthen their willingness to recommend his establishment. On the whole, I am of

opinion that having regard to the plenary authority he possessed, Ireton's motive and object in the trip were for the jury, who were not bound to accept his evidence, and who might attribute the journey to the performance wholly or in part of the wide duties entrusted to him. Even if he did not think of selling, he might have sold, and in any case, he was advertising and showing the style and vogue of his car.

Another point was glanced at. Suppose that at the time of the accident, Ireton's object was pleasure without a tincture of business, would that constitute a defence? It is not at all the case of a bailment or loan to a servant for his own personal purposes on a particular occasion. The manager was his employer's *alter ego*—he could use the car as he liked—and, whether his use was for his master's interest or incidentally his own amusement, might it not be said that in either case he was acting as his employer's agent? Half the journey might be for business, half for pleasure, or *vice versa*: a trip commenced for either purpose might have its character changed on the way. Ireton was enabled to be a "quick-change" performer, with the peculiarity that the change was effected by his own volition, and was not discernible from outside. Whatever purpose he drove with, he would be exercising the managerial authority committed to him; and, in any case, the user would incidentally, even in the case of a pleasure trip, to some extent subserve the defendants' interests, *i.e.*, by display and advertisement. On this point no authority has been cited; it has not been argued, and I only notice the question lest it should be supposed that I assented to the argument of the defendants' counsel that if the primary object of the journey was pleasure, the defendants must be exonerated. The point does not now properly arise for determination, and I do not decide it.

The defendants' notice of motion merely asks for judgment, not for a new trial. It seems to me impossible to enter judgment, and, even if a new trial was right, I think there is not sufficient ground for granting this application.

Solicitors for the plaintiff: *William Graham & Son.*
Solicitors for the defendants: *G. & H. Jefferson.*

C. N. K.

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Feb. 22, 23, 28.

Appeal.

May 9, 10. June 9.

CLEMENTS *v.* CONROY (1).

Vendor and purchaser—Particulars of sale, whether misleading—Sub-lease—Notice of.

The advertisement of an intended sale of a publichouse described it as in the occupation of a tenant at a yearly rent, but did not specify the tenure by which the tenant held. An intending purchaser having seen the advertisement made an offer which was accepted, subject to conditions of sale, an agreement incorporating which she signed, and which stated explicitly that the tenant of the publichouse held under a lease which had ten years to run. There was a conflict of evidence as to whether the intending purchaser understood before signing the agreement that this lease was outstanding, and she sought to repudiate the purchase on the ground that she was misled by the advertisement into supposing that there was a yearly tenant in occupation of the publichouse. In an action by the plaintiff for the deposit, fraud was not pleaded or alleged, but the jury found in answer to questions put to them that the purchaser was misled by the advertisement, and did not understand when signing the agreement that there was the lease of the publichouse outstanding.

Held, by the King's Bench Division and the Court of Appeal, that there was no question for the jury, and that a verdict should have been directed for the plaintiff; that the advertisement was not misleading; and that applying the principle of *Carroll* v. *Keayes* (I. R. 8 Eq. 97), it was sufficient to put the purchaser on inquiry as to the tenure under which the occupier held; and that in the absence of fraud she was bound by the agreement which she signed specifying the actual tenure.

Semble, there is no conflict in principle between *Carroll* v. *Keayes* and *Caballero* v. *Henty* (L. R. 9 Ch. App. 447); but even if there were, *Carroll* v. *Keayes* must be considered an authority binding in this country.

ACTION to recover £125 on an account stated and settled between the plaintiff and the defendant, being the amount of an I. O. U. given by the defendant to the plaintiff, dated 19th October, 1910; and in the alternative for money due by the defendant to the plaintiff under a contract in writing, dated 19th October, 1910.

In addition to traverses the defendant pleaded, (5) that the account was stated under a mistake induced by the plaintiff and

(1) In the King's Bench Division before LORD O'BRIEN, L.C.J., and BOYD, J.

his agents, and immediately upon discovery thereof the defendant repudiated the said account and I. O. U.; (7) there was no consideration for the agreement sued on; (8) no title was shown nor conveyance tendered; (9) this sum of £125 was the deposit on a sum of £500 offered by the defendant for the purchase of certain premises advertised for sale by the plaintiff, which offer the plaintiff alleges he accepted so as to make a valid and binding agreement for sale. The defendant says she is not bound by the alleged agreement, as the particulars contained in the advertisement were false, misleading, and inaccurate, and that she was induced to enter into said agreement, and to give the I. O. U., without any knowledge that the most valuable part of the premises for sale were sub-let upon lease for a long unexpired term, and without independent advice; (10) the defendant further says that the plaintiff, and those acting on his behalf, misrepresented the condition of the said premises; and that the plaintiff, acting in bad faith, has induced certain of the tenants of the said premises to surrender their tenancies. The defendant says that by reason of the matters aforesaid she was entitled to repudiate, and before action did repudiate, the said agreement, and any liability on foot of said account stated and I. O. U.

COUNTERCLAIM.

Repeating paragraphs (5), (9), and (10) of the defence, the defendant counterclaimed to have the said agreement set aside, and the I. O. U. delivered up to be cancelled.

The plaintiff joined issue, and also in his reply alleged that the defendant before action waived her right (if any) to deduction of title or tender of conveyance; that the particulars advertised were not false or misleading; that defendant had notice of the sub-letting of the public-house; that she had independent advice; and that there was no misrepresentation by the plaintiff, or any one acting for him, as to the condition of the premises.

The action was tried in Dublin in the Hilary Sittings, 1911, before Dodd, J., and a city common jury.

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The defendant, in October, 1910, saw in a newspaper the following advertisement :—

"VALUABLE LEASEHOLD PROPERTY

"FOR SALE BY PUBLIC AUCTION,

"IN THE

"ARCADE YARD, DUBLIN ROAD, OMAGH,

"On Monday, 17th October, 1911, at 2 p.m.,

"The property of David Alexander Clements, Esq., J.P.

"All that house and premises situate in Market Street, in the town of Omagh, bounded, &c. The said premises are now in the occupation of Mr. Bernard J. M'Closkey, and Messrs. M'Grath, Bros., as tenants to the said David Alexander Clements, and are held under lease, dated 14th September, 1891, from Lieut.-Col. Robert Hawkes Ellis, for the term of thirty-eight years, from the 1st November, 1891, subject to the yearly rent of £32.

"The rents payable by the tenants are as follows :—

Bernard J. M'Closkey,	House and shop,	£40	0	0
,, ,,	Billiard-room, .	14	5	0
,, ,,	Store, . .	4	0	0
		£58	5	0
M'Grath, Bros., .	. . .	10	0	0
		£68	5	0
Less head-rent, .	. . .	32	0	0
	Profit rent,	£36	5	0

"These premises are situate in the very best business part of the town of Omagh, and have always been in the occupation of solvent tenants, who carry on large and lucrative businesses. The portion of the premises in the occupation of B. H. M'Closkey consists of licensed premises in which a large wholesale and retail wine and spirit business is carried on, with a first-class billiard-room attached.

"The property is in an excellent state of repair and condition, and the sanitary arrangements are perfect. The sale should, therefore, command the attention of persons wanting a sound investment, as it is seldom that such a valuable block of leasehold property is offered to the public.

"Terms—A deposit of £25 per cent. on the amount of the purchase-money, together with 2½ per cent. auction fees, to be paid on the purchaser being declared, the remainder on completion of purchase, according to the conditions of sale.

"Private proposals will be received by the undersigned up to three days preceding the sale, which must be subject to the conditions of sale. Apply to

"Messrs. DICKIE & CARSON, Vendor's Solicitors, Omagh,

or to JAMES WILSON, Auctioneer, &c., Omagh."

The defendant, on the 9th October, 1910, wrote to Messrs. Dickie & Carson asking what they would take (see letter, *infra*, p. 511). They replied on the 12th that she must make an offer, and on the 15th she wrote them a letter of that date offering £500. They replied by the letter of the 17th October, 1910, which is given in full, *infra*, pp. 511–12. On the 19th October, the defendant, after having seen her own solicitor, Mr. Donnelly, visited Dickie & Carson's office, and had an interview with Mr. John F. Dickie, a member of the firm. His evidence at the trial was as follows:—"I read over the conditions of sale. When we came to paragraph 13, I read paragraph carefully. I got the leases and read them also. I read M'Closkey's lease. I showed her lease. There was a calculation made by Mr. Robb and me as to length of the lease. The lease was to terminate in 1920. It was explained to her that the billiard-room was not included in the lease; that the billiard-room was held under a yearly tenancy as well as I remember. She asked could that be dropped. I told her it could. I explained that M'Grath's take could be dropped; it was entirely a yearly tenancy. I explained condition 13 fully. I had a conversation about money. She said the money could not be got that day. I took two I. O. U.'s, one for the deposit, one for the auction fees, £12 10*s.*;

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it is payable to the auctioneer. She said she would pay both the next day. She informed me she had £300 in bank. After that she signed the conditions of sale. I signed as agent for the vendor." The witness then stated that the following day the defendant came to his office accompanied by Mr. Davidson, Manager of the Ulster Bank, Omagh. It appeared that defendant's money was in a New York savings-bank, and could not be made available for some days. A cheque was drawn by defendant in favour of Dickie & Carson for £137 10*s*. It was arranged that completion of sale was to stand over until the money came from America, of which Mr. Davidson was to notify witness. On the first November, Mr. Davidson called on witness with defendant and told witness she had stopped the cheque. She informed witness that she did not intend to go on with the sale—that she had seen M'Closkey, who said she had given too much—that he had a claim for £600 for improvements—that he was going to give up the billiards, and that the M'Graths were going to give up their premises. The evidence of this witness was corroborated by Mr. Robb, and was believed and acted upon both in the Divisional Court and Court of Appeal. Subject to the qualifications which she afterwards made, the defendant admitted that the conditions of sale were read to her by Mr. Dickie, and that she signed the agreement; but said that she did not understand that M'Closkey had a lease with ten years to run. She denied that at the interview of the 19th October the lease was sent for or brought down. She did not know of it till the 1st November. She said that condition No. 13 was not read to her. She thought M'Closkey was tenant from year to year. As to the interview of the 1st November, her evidence was substantially the same as that of Mr. Dickie.

The material conditions of sale were as follows. The portions of No. 13 which, according to the Judge's report, the defendant admitted being read to her on the 19th, are enclosed in brackets:—

"11. The property is believed and shall be taken to be accurately described as to quantity and otherwise, and is sold subject to all tenancies, rights of way, and other easements, if any subsisting thereon, and if any error, mis-statement, or omission be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof.

"13. [A portion of the property offered for sale consisting of a dwelling-house, tenement, and premises No. 43 Market Street, and No. 1 Dublin Road, situate in Market Street, in the town of Omagh, is held by Bernard Joseph M'Closkey] as tenant under lease, dated 17th December, 1897, made between the said David A. Clements of the one part, and the said Bernard Joseph M'Closkey of the other part, for the term of twenty-two years from the 1st January, 1898, subject to the yearly rent of £40 and the covenants and conditions therein contained. [Other portions of the said property offered for sale situate in Dublin Road, Omagh, aforesaid, used as a billiard-room and store, are held by the said Bernard J. M'Closkey as tenant from year to year under the vendor at the yearly rents of £14 5*s.* and £4, respectively. And the remainder of the said property offered for sale situate in the Dublin Road aforesaid, is held by M'Grath Bros. as tenants from year to year at the yearly rent of £10.]

"14. The said two indentures of lease, dated the 14th September, 1891, and the 17th December, 1897, respectively, will be produced at the time of sale, and may be inspected there or at the offices of Messrs. Dickie & Carson, the vendor's solicitors, during office hours up till the time of sale, and the purchaser will be deemed to have full knowledge of the contents thereof, respectively, whether he shall have availed himself of such inspection or not.

"15. If the purchaser shall neglect or refuse to comply with these conditions, his deposit will be forfeited to the vendor."

Stamp 6d.

"AGREEMENT.

"I, MARGARET ANNE CONROY, of Kilnaheery, Curr, Beragh, spinster, do hereby acknowledge that on the sale by private treaty this 19th day of October, 1910, of the property mentioned in the foregoing particulars, I was the highest bidder, therefore was declared the purchaser thereof, subject to the foregoing conditions of sale, at the price of £500, and that I have paid the sum of £125 by way of deposit and in part payment of the said purchase-money, and I hereby agree to pay the remainder of said purchase-money and complete the said purchase according to the aforesaid conditions.

"MARGARET A. CONROY."

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"As agents for the vendor we ratify this sale and acknowledge the receipt of the said deposit of £125 *per* I. O. U., and also £12 10*s.* auction fees.

"Dated this 19th day of October, 1910.

"DICKIE & CARSON."

At the conclusion of the defendant's case *Henry, K.C.*, for the plaintiff, asked for a direction, citing *Carroll* v. *Keayes* (1).

His Lordship declined to direct, but left the following questions to the jury, who answered them as stated :—

1. Were the particulars of sale misleading ? Yes.

2. Was the defendant in fact misled ? Yes.

3. (*a*) Were the parties of one mind as to the subject-matter of the contract of the 19th October, 1910 ? No.

3. (*b*) Did the defendant understand, and was she led by the misleading character of the particulars to understand, that the subject-matter of the contract was a public-house of which she could obtain clear possession after serving notice to quit ? Yes.

3. (*c*) Were the reading of these conditions of sale, and the explanation of them by Mr. Dickie in his office, sufficient to remove, and did they in fact remove, the misleading effect of the particulars in the mind of the defendant ? No.

3. (*a*)—3. (*c*) were substituted for the question, "Was there a concluded contract on the 19th October, 1910 ?" under the following circumstances as reported by the learned Judge. The jury, having returned to Court, said they could not agree as to No. 2. They might agree if they were at liberty to say "yes" to the last question (No. 3 as originally framed), but they could not agree upon it. His Lordship told the jury that this question was not directed to whether there was a signed document by which the defendant was bound. That was a matter of law. The points raised by the defendant's counsel were that there could not be a contract unless the parties were of one mind as to the subject-matter of it. If the defendant misled herself into signing a document, the Court would hold her bound by it.

Counsel for the plaintiff objected to any questions being left to the jury.

(1) I. R. 8 Eq. 97.

Counsel for the defendant asked his Lordship to direct that the particulars of sale were misleading in not stating the sublease to M'Closkey, and that the onus was upon the plaintiff to prove that the defendant was made aware of this before signing the agreement annexed to the conditions of sale.

His Lordship, on the findings, declined to enter judgment for either party.

Both parties moved the Divisional Court for judgment.

Serjeant Moriarty, K.C., and *Murnaghan*, for the defendant.
Henry, K.C., and *Wylie*, for the plaintiff.

LORD O'BRIEN, L.C.J.:— Feb. 28.

Mr. Henry, on behalf of the plaintiff, consistently pressed for a direction; I think he was entitled to the direction he sought. I may say at the outset that, having read the evidence of Mr. Dickie and Miss Conroy, I am satisfied Mr. Dickie's account of what took place on the 19th October was the correct one. I am of opinion that the defendant, having seen Mr. M'Closkey, repented of her bargain; she thought she had given too much for the premises, and that she thereupon resolved to get rid of her purchase as best she could. Her statement as to what was read to her of the conditions was most remarkable indeed. It is not that she misunderstood what was read, but she swore directly and explicitly that Mr. Dickie read to her so much of the conditions only as would be consistent with the case made on her behalf here, but that he deliberately omitted to refer to those parts of the conditions which would fix her with liability; that in fact Mr. Dickie deliberately skipped all that part of the conditions that had reference to M'Closkey's lease. (See the parts of the conditions marked in red and black pencil by the learned Judge (1).) As I said during the argument, this would have been a very gross and direct fraud on the part of Mr. Dickie. It is to be remembered that fraud was not pleaded nor found. It was, in my opinion, fraud or nothing. I repeat that I am

(1) These are indicated *ante*, p. 505, by brackets.

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entirely satisfied with Mr. Dickie's account of the transaction, supported as it was by the evidence of Mr. Robb, his conducting clerk, and of Mr. Davidson, the Bank Manager. I think it right by Mr. Dickie, a gentleman of high standing in his profession, to express the opinion I very clearly entertain. No doubt the opinion of the jury was, somewhat at least, inconsistent with this view; but the mind of the jury, when a lady is concerned, is sometimes of a very impressionable and malleable character. However, I think the case should not have been submitted to a jury at all—that it was a case for a direction.

I now proceed to state my reasons for thinking that Mr. Henry was entitled to the direction he sought. The whole case for the defendant was based on the assumption that the advertisement was misleading; if there was nothing to mislead, there was nothing to complain of, and a verdict should have been directed for the plaintiff. Was there anything to mislead? In my opinion there was not, if *Carroll* v. *Keayes* (1) be good law, and if, notwithstanding *Caballero* v. *Henty* (2), we should follow *Carroll* v. *Keayes* (1).

Mr. Wylie, who argued the case with so much clearness, submitted that, even if *Carroll* v. *Keayes* (1) and *Caballero* v. *Henty* (2) were irreconcilable, we should follow the former case, as it is a decision of the Court of Appeal in this country. I accept the contention of Mr. Wylie, and I do so on the assumption that *Carroll* v. *Keayes* (1) and *Caballero* v. *Henty* (2) are irreconcilable, though, as regards this, I shall make some observations later on. What, then, was the true ground of decision in *Carroll* v. *Keayes* (1)? What was the *ratio decidendi*? This, that knowledge of the fact of occupation or possession by a third party affects the vendee with notice of the title and rights of that third party; and that, as between vendor and vendee, as well as between vendee and the person in occupation or possession, the vendee takes subject to those rights. No doubt, if the defendant, the vendee in this case, had made inquiry before she signed the agreement, she would have discovered the entire and actual conditions in point of fact; but, not having made

(1) I. R. 8 Eq. 97. (2) L. R. 9 Ch. App. 447.

inquiry, she is bound by the existing rights. This was the *ratio decidendi* in *Carroll* v. *Keayes* (1). Serjeant Moriarty on behalf of the defendant relied upon some observations in the judgment of Lord Justice Christian to show that the position of the occupier in that case was a negligible matter; but the main proposition, the *ratio decidendi*, was what I have mentioned.

Before I refer to some passages in *Carroll* v. *Keayes* (1) let me advert to the case upon which it was founded. There the *ratio decidendi* of *Carroll* v. *Keayes* (1) is to be found, viz., *James* v. *Lichfield* (2). In that case it was decided that, where a vendor contracted to sell certain property which the purchaser knew to be in the occupation of a tenant, and it was afterwards discovered that the tenant had a lease, the purchaser was affected with notice of the lease, and was not entitled to specific performance *with compensation*. The plaintiff in that case advanced the same proposition, *ipsissimis verbis*, that was advanced by the defendant here. But what was Lord Romilly's judgment? He expressed himself thus:—

"The principle is thus stated in argument in that case, *Daniels* v. *Davison* (3): 'Whatever puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest.' This was adopted by the Lord Chancellor, who decided accordingly; and I am unable to see any ground for a technical and, as it appears to me, an arbitrary distinction, which should limit the application of the rule to one person, when the reason of it extends to all persons whatsoever. If the purchaser, knowing of the tenancy, is bound to inquire, as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be bound as regards the vendor? and if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy, but without having accurately ascertained what were the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the

(1) L. R. 8 Eq. 97. (2) L. R. 9 Eq. 51. (3) 16 Ves. 249, at p. 251.

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same manner as regards all other persons. I think also that no distinction can properly be drawn in a Court of Equity, on the ground that the matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from, and were incidental to, that notice."

It will be seen that the case was elaborately argued, and that judgment was not delivered at the close of the argument, but after several days' consideration.

So also *Carroll* v. *Keayes* (1) was most elaborately argued, and every case on the subject was cited. The argument occupied five days, and after some ten days judgment was delivered. It is only requisite to read the judgment to see how exhaustively the case was dealt with. The decision, as I have stated, was founded on *James* v. *Lichfield* (2); that case was examined with the greatest care, and was approved and followed. Lord O'Hagan, then Lord Chancellor, is reported to have asked, "Is there a substantial distinction because the parties to the controversy here are not purchaser and tenant, but purchaser and vendor?" (See top of page 118 of the report.) After an elaborate examination of *James* v. *Lichfield* (2) he decided there was none. (See pages 118, 119, and 120 of the report.) Christian, L.J., expressed himself to the same effect as Lord O'Hagan, using considerably more emphatic language than that which his lordship had made use of. He actually put practically the same question that Lord O'Hagan had put, and answered it as Lord O'Hagan had, except that his language was more emphatic. (See page 135 of the report.)

Now turn to the advertisement, which had been published more than once, and which the defendant had seen. It states in so many words that the premises are now in the occupation of Mr. Bernard J. M'Closkey and Messrs. M'Grath, Bros., as tenants to the said D. A. Clements; and there is also the defendant's letter of the 9th October, 1910, to Messrs. Dickie & Carson.

(1) I. R. 8 Eq. 97. (2) L. R. 9 Eq. 51.

"Kilnaheery,

"Curr,

"Beragh, 9/10/'10.

"Messrs Dickie & Carson,

"Dear Sirs—Kindly let me know the lowest you will take for that house of Mr. D. Clements, now in occupation of B. J. M'Closkey and M'Grath, Bros., and oblige,

"Margaret A. Conroy."

All this was amply sufficient to make the defendant amenable to the doctrine laid down in *James* v. *Lichfield* (1) and *Carroll* v. *Keayes* (2). But let me go back to the advertisement. It states what the rents payable are, and, after a calculation, brings out a profit rent of £36 5*s*. All this is in the descriptive particulars. [His Lordship read the particulars, *ante*, pp. 502, 503.] It will be noted that it is stated that the sale should command the attention of those who desired a sound *investment*. This statement and the statement as to the profit rent indicated that the premises were offered as a good investment, whatever the defendant may now say, or may have misled herself into believing. Let me now come to the conditions of sale; but, before I read them, let me refer to the letter of October 17th, from Dickie & Carson, to the defendant—

"Omagh, 17*th October*, 1910.

"*Mr. Clements's premises, Dublin Road.*

"Dear Madam,

"We have your favour of the 15th inst., offering £500 for these premises as advertised. The sale was to have been held to-day at 2 o'clock, and it was intended to put on a reserve price of £600. After receipt of your letter we discussed the matter with our client, and he decided to instruct us to accept your offer. We, therefore, withdraw the premises from sale, and beg to notify

(1) L. R. 9 Eq. 51. (2) L. R. 8 Eq. 97.

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you that we accept your offer, subject, of course, to the conditions of sale as mentioned in the advertisement. Kindly, therefore, come down here on receipt of this, and sign the conditions of sale, and pay the deposit.

"Yours faithfully,

"DICKIE & CARSON.

"Miss Margaret A. Conroy,
"Kilnaheery, Curr, Beragh."

This letter contains a specific reference to the conditions of sale, as, indeed, also did the concluding lines of the advertisement, which provided that private proposals should be subject to the conditions of sale. Take then the conditions. Could anything be more explicit than the 13th and 14th conditions? And that these were read to the plaintiff I am entirely satisfied by the evidence of Mr. Dickie and Mr. Robb. It will be remembered also that Mr. Davidson, the bank manager, swore that at an interview between Mr. Dickie and the defendant herself, Mr. Dickie had stated that at a former interview he had read over the conditions of sale to the defendant, and carefully explained the matter, and that the defendant admitted that this was so. M'Closkey, who himself was evidently desirous to acquire the premises, was, I understand, in Court, and was not examined. His cross-examination as to what took place between him and the defendant would have been at least interesting; and I should also have liked to have heard what Mr. Donnelly, the lady's solicitor, from whom she came hot-foot to Mr. Dickie, had to say upon the matter. Perhaps he would show that she had a keener and more comprehending intelligence than she imputed to herself. However, I must not permit myself to be carried away by what, after all, may be mere speculation.

I now come to *Caballero* v. *Henty* (1). This case was, undoubtedly, decided by very distinguished Judges—by Sir George Jessel, in the first instance, whose judgment was affirmed on appeal by Lord Justice James and Lord Justice Mellish. But it would appear to me that that case is distinguishable, in some respects at least, from *James* v. *Lichfield* (2) and

(1) L. R. 9 Ch. App. 447. (2) L. R. 9 Eq. 51.

Carroll v. *Keayes* (1), and most certainly from the present case. The defendants in that case were brewers; and this fact would, in itself, tend to show that they wanted immediate occupation of the premises for business purposes. Besides, it was a question of agency, and James, L.J., held that there was no authority given to the agent in question to do what he did; and certainly in that case there was nothing like the 13th and 14th conditions in this case. In that case the 5th condition was that the premises were sold subject to the tenancies then existing—no more—nothing like the 13th and 14th conditions in this case, which explicitly stated everything, and left nothing to the imagination; and, as to these conditions, I am clearly of opinion, notwithstanding any finding of the jury, that the defendant knew in point of fact what these conditions were in their entirety; and I am moreover of opinion that once she signed the agreement, she must be taken to have known the conditions which it incorporated. No defence of fraud was pleaded; no fraud was found in point of fact; and if it had been found, there would have been no evidence to sustain it. It must be borne in mind too that no fiduciary relationship existed between Mr. Dickie and the defendant; there was no unconscientiousness within the meaning of *Torrance* v. *Bolton* (2); and if the lady was misled, she misled herself. As to the suggestion that, though the lady signed the agreement, there was no contract, because the parties were not *ad idem*, this is, I think, a proposition wholly unsustainable. Certainly there was no mutual mistake; and as to this there is a passage in the judgment of Christian, L.J., which, now that the rules of equity must prevail if there is any conflict between them and the rules of common law, seems to me peculiarly relevant. Dealing with the question that he and Lord O'Hagan had asked, he said (p. 136):—"The only ground on which, as it occurred to me, a distinction might be made, was one which I threw out during the argument, namely, that there is a duty on a vendor to disclose latent defects, but none such on a tenant who is no party to the contract. But a little reflection shows that this would strike at the root of the

(1) L. R. 8 Eq. 97.

(2) L. R. 8 Ch. App. 118. (See Lord Justice James' observations at p. 124 of the report.)

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whole branch of the doctrine of constructive notice, for the principle of it is that the vendee's duty of inquiry, springing from notice of possession, supersedes the vendor's duty to disclose, and if both remain silent, the purchaser is held to take subject to all existing rights." *Aaron's Reefs* v. *Twiss* (1) has no application to this case; fraud was pleaded in that case, and insisted upon throughout; and *Gardiner* v. *Tate* (2), if at all a satisfactory case, seems not to be very helpful. There it would appear that the auctioneer, by word of mouth, misdescribed the premises. (See the judgment of O'Brien, J., at page 471 of the report.) But I must confess that I think that not very much light is afforded by that case. In that case the vice which was ascribed to the advertisement attached also to the conditions. Here conditions 13 and 14 are as explicit as they well could be.

Perhaps I might refer before I close to the latest case on this subject, the case of *Hunt* v. *Luck* (3).

The facts of that case are no doubt different from the facts here, and the precise point in controversy may be of a different character from that before us; but it deals very clearly with the effect of notice from knowledge of a tenant's occupation. Vaughan-Williams, L.J., says:—"Now, what does that mean? It means that if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession, of the tenant in possession, and find out from him what his rights are; and, if he does not choose to do that, then whatever title he acquires as a purchaser or mortgagee will be subject to the title or right of the tenant in possession."

On the whole case, I think that, as I said at the outset, Mr. Henry was entitled to the direction he asked for; we will enter judgment accordingly with costs of the trial and of this motion.

BOYD, J.:—

Having arrived at the same conclusion as that so ably stated by the Lord Chief Justice, it will not be necessary for me to go at length into the facts of this case.

(1) [1895] 2 I. R. 207; [1896] A. C. 273.

(2) I. R. 10 C. L. 460.

(3) [1902] 1 Ch. 428.

The particulars of sale describe the property as being the valuable leasehold property of the plaintiff, and describe the premises as being "now in the occupation" of sub-tenants. The rents paid by these tenants are set out, and a profit rent of £36 5*s.* is shown. The particulars also state that the premises have always been in the occupation of solvent tenants, and that portion of the premises were let to B. M'Closkey, on which portion a substantial wine and spirit business was carried on. It is not usual for people having a large and substantial licensed business to carry on such business on premises held from year to year. The words in the particulars are "is now in possession," "is now being carried on," and then the further statement that the premises should command attention as a *sound investment*; a statement which, taken with those already referred to, showed that it was not the possession of the premises but a valuable investment for money which was being sold. It was also stated that the sale was to be by public auction, but that private tenders would be received three days before the date fixed for sale by auction, such tenders to be subject to the conditions under which the property was to be sold by auction. The defendant wrote on the 9th October, asking what sum would be accepted for the premises: she was informed that she should make an offer, which she did in her letter of the 15th. [His Lordship then read the defendant's letter of that date.] Her offer was accepted, and the sale by auction was abandoned, and on the 19th the defendant called on the plaintiff's solicitors, when the defendant signed the conditions.

If it was sought to discredit in any way the evidence of Mr. Dickie as to what took place on the 19th, his account should be discredited by faithworthy evidence. Was the evidence of the defendant of that character? The defendant admits that the conditions were read to her, but she says that portions of the conditions were not read. She is evidently a woman of great ability, and well able to look after her own interests. The portions she admits as read and the portions she denies are very peculiar. [His Lordship then read the conditions down to No. 13.] What she says as to condition 13 is very peculiar. She admits that part of that condition was read, but she says that

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part was omitted. As to the part read, she stops in the middle of a sentence. This is a deliberate charge of fraud against Mr. Dickie, who says that the entire of the conditions was read to her—a statement corroborated by the evidence of Mr. Robb and of Mr. Davidson. The portions of condition 13 read, and the portions omitted, according to her statements, are very remarkable; they show a little fraud on the part of someone at all events. [His Lordship then read the condition as marked by the learned Judge at the trial.] If the omission which the defendant alleges was made, it must have been a deliberate fraud on the part of Mr. Dickie. The defendant had not the courage to put a plea of fraud on the file; she only pleaded mistake. She knew that if she pleaded fraud, she could not get the jury to find for her, but that if she made the case of having been misled, she might obtain a verdict. She says that the portion of the condition which dealt with M'Closkey's lease was not read, but that the rest of the condition was read, including the particulars of all the other tenancies. The learned Judge at the trial was so struck by her statements that he marked the portions with a black pencil which she admitted had been read, and in red as to those parts she said had been omitted. She now seeks to get out of her contract on the ground that she did not know that M'Closkey held under a lease—a curious statement if, as was stated in the argument, he was some connexion of hers. M'Closkey had offered £250 for the premises, and when she learnt this she thought she had given too much for the property. She now says that the agreement must be set aside, and she relies as mistake on what would be a deliberate fraud on the part of Mr. Dickie, though she has not had the courage to plead fraud. Is this reliable evidence on which to act against the evidence of Mr. Dickie? Mr. Robb says that he got the two leases, Clements's and M'Closkey's, and read them to the defendant, and, curiously enough, the defendant admits that there were two leases produced, although she says that it was not until the 1st of November that she knew of M'Closkey's lease. How is the defendant also contradicted? By Mr. Davidson, the manager of the bank with which she did business. He came with her on the 20th of October, to arrange about the payment of the money; he said that the

proper method would be by cheque, and that he would send to America for the money, and lodge it to her credit when it had been remitted. In the meantime M'Closkey had influenced her. I suppose he did not like the idea of leaving the premises; and after seeing him she arrived at the conclusion that she should repudiate her agreement on the ground of mistake. On the question of law, I should like to remark that in the case of *Caballero* v. *Henty* (1) the ground of the decision was, that there the agent had exceeded his authority. The owners of a brewery wanted to buy premises on which their beer alone should be sold. The premises purchased were occupied, under lease, by a brewer who sold his own beer. The Court came to the conclusion that the agent who had bought the premises had exceeded his authority, and that the purchasers were not bound by the contract. The case of *Carroll* v. *Keayes* (2) is an express decision on the point, decided by excellent Judges. Christian, L.J., goes elaborately into the whole question, and says that if there was reliable evidence that the purchaser was *bona fide* misled by a statement in the advertisement, he might be entitled to relief; but if this was not so, he was put on notice, and if he failed to make inquiry he took subject to the matters which such inquiry would have disclosed.

I have come to the conclusion that, if there was any fraud in the case, it was not on the part of the plaintiff or his solicitor, and that the real ground why the defendant wants to get out of her contract is not that she was misled, but that she thinks she offered too much for the property.

C. N. K.

The defendan appealed (3).

Serjeant Moriarty, K.C., and *S. L. Brown, K.C.* (with them *Murnaghan*), for the defendant:—

The particulars, advertised as a guide to intending purchasers, and as a synopsis of what the vendor was offering for sale, were

(1) L. R. 9 Ch. App. 447. (2) I. R. 8 Eq. 97.

(3) In the Court of Appeal before THE LORD CHANCELLOR, and LORDS JUSTICES HOLMES and CHERRY.

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misleading. The outstanding lease was deliberately suppressed. The fair inference to be drawn would be that the tenancy was a yearly one which could be put an end to by the service of a six months' notice to quit. The burden, therefore, lay on the plaintiff and his solicitor to show that before the defendant signed the agreement on which the plaintiff is suing, the false impression produced by the misleading particulars was removed by adequate explanation. According to her evidence she was misled by the particulars, and the misapprehension continued when she signed the agreement. If there was a conflict of evidence, the jury believed her story.

Where a purchaser *bona fide* misunderstands conditions of sale, a Court of Equity will rescind the contract, though no actual fraud on the part of the vendor or his agents be proved. The Court considers it unconscientious to enforce such a contract: *Torrance* v. *Bolton* (1). In that case the Court of Appeal was much influenced by the misleading nature of the descriptive particulars, and that the erroneous impression thereby likely to be produced in the mind of a bidder is not likely to be displaced by a statement which is found in the midst of lengthy and complicated conditions of sale. The judgment here in the Court below was founded altogether on *Carroll* v. *Keayes* (2), which in its turn was based on *James* v. *Lichfield* (3). But both these cases are inconsistent with *Caballero* v. *Henty* (4), by which they must be taken to be over-ruled.

Henry, K.C., and *Wylie*, for the plaintiff :—

There was no question for the jury in this case, and the plaintiff was entitled to a direction. There was nothing misleading in the particulars, and the learned Judge ought to have so held. But at any rate the defendant—a person of considerable intelligence—fresh from her own solicitor's office, where the matter had evidently been discussed—neither illiterate nor suffering from any physical infirmity, signs a printed agreement to purchase subject to Mr. M'Closkey's lease, and in the absence of fraud she cannot

(1) L. R. 8 Ch. App. 118.
(2) I. R. 8 Eq. 97.
(3) L. R. 9 Eq. 51.
(4) L. R. 9 Ch. App. 447.

be heard to say that she did not understand that agreement. In *Torrance* v. *Bolton* (1) the purchaser was deaf. He did not hear the auctioneer reading the conditions of sale, which were not distributed for perusal by those attending the auction. The particulars, as advertised, were clearly misleading, suppressing as they did three mortgages subject to which the sale was to be made. Fraud is not pleaded here. There was no evidence of fraud, and no question of fraud was left to the jury.

Notice of possession by a tenant is notice to a purchaser of all equities which the tenant has against his vendor: *Barnhart* v. *Greenshields* (2): see judgment of Mr. T. Pemberton Leigh (afterwards Lord Kingsdown), delivering the judgment of the Judicial Committee, in which, at p. 32, he deals with this question, summing up the authorities on the point up to the date of that case (1853), including *Bailey* v. *Richardson* (3), before Turner, V.-C. The law as laid down in *Barnhart* v. *Greenshields* (2) was recognized as an authentic statement of the law on this subject by Farwell, J., in *Hunt* v. *Luck* (4). In the same case on appeal, [1902] 1 Ch. 428, Vaughan Williams, L.J., says, p. 433, "If a purchaser or mortgagee has notice that the vendor or mortgagee is not in possession of the property, he must make inquiries of the person in possession—the tenant in possession—and find out from him what his rights are, and if he does not choose to do that, whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession." No doubt the question raised in *Hunt* v. *Luck* (4) was whether notice of the tenancy was notice of the lessor's title, but the principles governing the question for decision were emphatically affirmed by the distinguished Judges before whom the case came, and were not really in dispute between the parties.

The present case is governed by *Carroll* v. *Keayes* (5). There it was decided that the consequences of notice by an intending purchaser of a tenant's possession were not merely (as was conceded) binding notice of the tenant's interest as between the purchaser and the tenant, but were equally binding as between

(1) L. R. 8 Ch. App. 118.
(2) 9 Moo. P. C. 18.
(3) 9 Hare, 734.
(4) [1901] 1 Ch. 45.
(5) I. R. 8 Eq. 97.

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vendor and purchaser, so as to justify a decree for specific performance without compensation. That case, decided by the highest tribunal in this country, followed the decision of Lord Romilly in *James* v. *Lichfield* (1), which has never been questioned or disapproved of. It was cited to the English Court of Appeal in *Caballero* v. *Henty* (2), decided some six months afterwards, before the report of *Carroll* v. *Keayes* (3) was published. But it is plain that though the Lords Justices in *Caballero* v. *Henty* (2) may not have approved of all that was said by Lord Romilly in *James* v. *Lichfield* (1), they did not over-rule his decision, or deny the proposition of law on which it rests. And when the facts of *Caballero* v. *Henty* (2) are examined, it will be found to be quite distinguishable from the present case, and from *Carroll* v. *Keayes* (3). In *Caballero* v. *Henty* (2) the purchase was effected by an agent for a firm of brewers, who had only authority to buy if immediate possession of the premises could be given, so that the purchasers could use it for the sale of their beer. The sub-lease was not mentioned in the agreement, and though read out by the auctioneer was not (owing to noise and confusion in the auction room) heard by the purchasers' agent as he alleged.

But even if there be a material inconsistency between the cases, *Carroll* v. *Keayes* (3) was decided by a Court of co-ordinate jurisdiction with the English Court of Appeal, and should be followed in Ireland.

June 9.

THE LORD CHANCELLOR :—

This is an action brought to recover from the defendant a sum of £125 secured by the defendant's I. O. U., dated the 19th October, 1910, and representing a deposit of one-fourth of the purchase-money of certain houses and premises in Omagh, purchased by the defendant from the respondent.

The defence, in addition to traverses, is, that the sum sued for is the amount of a deposit on a sum of £500, offered by the defendant for the purchase of certain premises, as advertised by the plaintiff for sale, which offer was accepted by the plaintiff. The defendant

(1) L. R. 9 Eq. 51.
(2) L. R. 9 Ch. App. 447.
(3) I. R. 8 Eq. 97.

says that she is not bound by said alleged agreement, inasmuch as the particulars contained in said advertisement were and are misleading, false, and inaccurate, and that she was induced to enter into the said agreement, and give the said I. O. U., without any knowledge that the most valuable portion of the premises for sale was sublet upon a lease for a long unexpired term, and without independent advice.

There is also a defence that the plaintiff, and those acting on his behalf, misrepresented the condition of the premises, and that the defendant, acting in bad faith, had induced certain of the tenants of the premises to surrender tenancies in the premises held by them, and therefore that she was entitled to repudiate, and, before action, did repudiate the alleged agreement and any liability on the I. O. U.; and she also, setting forth the same matters, counterclaimed to have the agreement set aside and the I. O. U. delivered up to be cancelled.

The defendant, on the 9th October, 1910, read a printed advertisement of the sale of property described as a valuable leasehold, the property of the plaintiff, situate in the town of Omagh, and held under lease dated 14th September, 1891, for thirty-three years, subject to a rent of £32. The premises are described as "now in the occupation of Mr. Bernard J. M'Closkey, and Messrs. M'Grath, Bros., as tenants of them," and it then proceeds—

"The rents payable by the tenants are as follows:—

Bernard J. M'Closkey, House and shop,	£40	0	0
,, ,, Billiard-room, .	14	5	0
,, ,, Store, . .	4	0	0
	£58	5	0
M'Grath, Bros., ...	10	0	0
	£68	5	0
Less head-rent, ...	32	0	0
Profit rent,	£36	5	0

DESCRIPTIVE PARTICULARS.

"These premises are situate in the very best business part of the town of Omagh, and have always been in the occupation of

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solvent tenants, who carry on large and remunerative businesses. The portion of the premises in the occupation of B. J. M'Closkey constitutes licensed premises, in which a large wholesale and retail wine and spirit business is carried on, with a first-class billiard-room attached.

"The property is in an excellent state of repair and condition, and the sanitary arrangements are perfect. The sale should therefore command the attention of persons wishing to secure a sound investment, as it is seldom that such a valuable block of leasehold property is offered to the public.

"Terms—A deposit of £25 per cent. on the amount of the purchase-money, together with 2½ per cent., auction fees to be paid on the purchaser being declared, the remainder on completion of purchase, according to the conditions of sale.

"Private proposals will be received by the undersigned up to three days preceding the sale, which must be subject to the conditions of sale. Apply to

"Messrs. DICKIE & CARSON, Vendor's Solicitors, Omagh,

or to "JAMES WILSON, Auctioneer, &c., Omagh."

There is nothing in this advertisement to suggest the nature and extent of the tenancies, or that the purchaser would be entitled to obtain possession by service of a notice to quit, or otherwise. On the contrary, the whole advertisement points to a purchaser getting a good investment on well-secured rents.

The defendant, on reading the advertisement, wrote on the 9th October to Dickie & Carson, asking the lowest price, and the reply was, that she should send an offer; she then wrote offering £500; and this offer was, on 17th October, accepted, subject to the conditions of sale, and she was asked to come and to pay the deposit of £125, and sign the conditions of sale.

On the 19th October, she came into the office of Dickie & Carson. There is a conflict of testimony between her and Dickie and his clerk as to what occurred. She undoubtedly signed the conditions.

The 13th and 14th of those conditions are [His Lordship read these conditions, given *ante*, pp. 504, 505].

It was proved by Mr. Dickie and his clerk, that those conditions were read over to defendant.

She admitted that portion was read, but she denies that the portion which described certain of the premises as being held under lease was read. She admitted that the portions relating to the yearly tenancies were read. If so, Dickie would of course have been guilty of a gross and deliberate fraud, which any solicitor would have been severely punished for. She arranged to come back the next day to pay the deposit, and meantime she gave an I. O. U.

On the next day, the 20th, she came with the bank manager, who explained that he would have to telegraph to New York, where her money was, about the £500, but that meanwhile she would give her cheque. On the 1st November she came back with the bank manager, and she stated she had stopped the cheque, as she declined to proceed further with the purchase. It is obvious she had been advised she was giving too high a price. The present action was then brought, and I have already read the defence, pleaded by her, which does not contain any charge of fraud.

It is clear that this defence could not be sustained. She signed the conditions which I have read, and the particulars contained nothing misleading; and the conditions which she signed gave her express notice of the lease, and, in the absence of fraud being pleaded, she is plainly bound by the conditions which she admits Mr. Dickie purported to read to her. She does not say she asked for any information about the tenancies, or that there was any erroneous statement made in reference to them. Mr. Dickie and his clerk swear they were truly read to her, and the defendant's story is wholly incredible; and, having signed the conditions, which in fact contained all the information, she is in law bound by their contents.

The course of the trial seems very unsatisfactory.

The jury were asked first—

1. Were the particulars of sale misleading? Yes.
2. Was the defendant in fact misled? Yes.

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3. Was there a concluded and binding contract made between Messrs. Dickie & Carson as agents for the plaintiff and the defendant on the 19th October, 1910?

The jury had stated they could not agree as to No. 2, but that they might agree if they were at liberty to answer "yes" to No. 3, and the following questions were substituted for question No. 3:—

1. Were the parties of one mind as to the subject-matter of the contract of 19th October, 1910? No.

2. Did the defendant understand, and was she led by the misleading character of the particulars to understand, that the subject-matter of the contract was a public-house of which she could obtain possession by serving a notice to quit? Yes.

3. Were the reading of the conditions of sale, and the explanation of them by Mr. Dickie in his office, sufficient to remove, and did they in fact remove, the misleading effect of the particulars on the mind of the plaintiff? No.

This was in effect to make the case depend upon the advertisement, although the conditions which she signed gave full information.

The plaintiff's counsel asked for a direction, and, in my opinion, he was entitled to it in the absence of fraud or fraudulent concealment, which was not alleged nor pleaded.

Apart from this the defendant was distinctly apprised that the premises were in the occupation of tenants paying specified rents, and it lay on the purchaser then to inquire the particular tenure at which they were held. She had no right to assume that the tenancies were yearly tenancies. *Carroll* v. *Keayes* (1) in the Court of Appeal is a much stronger case than this. There the purchaser received no notice from the vendor that there were yearly tenants, but the purchaser, while visiting the lands, ascertained that certain other persons were in occupation of portion of the property, but he was not aware of the nature of their occupation. He signed the agreement without objecting to the occupation of these persons, and it was held he must be taken to have purchased

(1) I. R. 9 Eq. 97.

subject to them, and specific performance was decreed without any compensation. The Court of Appeal, there consisting of the Lord Chancellor and Lord Justice Christian, approved of the decision of Lord Romilly in *James* v. *Lichfield* (1), which cannot be distinguished from the present case. It was said that *Carroll* v. *Keayes* (2) is inconsistent with *Caballero* v. *Henty* (3), but I think there are two answers to this, first, that it is distinguishable (1) as being the sale of a public-house, in which possession is always desired and considered a material element; (2) the purchase was made by an agent who had no authority to buy a public-house sublet for a term of years; and (3) there was no reference in the signed agreement to the lease, and the reading of the lease at the auction was not heard by the agent for the buyers.

Lord Justice James said (p. 449):—"Their agent was not authorized to buy a public-house with a lease for eight years to another brewer; in fact, it was the last thing he would have been authorized to do. He says that he did not hear the lease read; but even if we assume that he did hear it, and then signed the agreement, still, in the signed agreement there is no reference to the lease. In that state of things it appears to me that the defendants are not bound to take this property, which was subject to a lease to another brewer for eight years at £20 a year."

Lord Justice Mellish takes the view that there was a misdescription in the particulars which made the agreement incapable of being specifically performed.

At all events, we are bound to follow *Carroll* v. *Keayes* (1) if it applies: and it is directly in point; and in this Court we have no right to question it.

HOLMES, L.J.:—

The question to be decided in this appeal is, whether the defendant is entitled to repudiate an agreement to purchase from the plaintiff certain houses in the town of Omagh, executed by her on the 19th October last, on the ground that she was induced to enter into the agreement by misleading statements in an

(1) L. R. 9 Eq. 51.
(2) I. R. 8 Eq. 97.
(3) L. R. 9 Ch. App. 447.

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advertisement published by the plaintiff as to the tenure of the premises offered for sale.

Although the evidence given by the defendant is in many particulars inconsistent with that of the other witnesses, there are some admitted facts sufficient to show how the controversy has arisen.

The defendant, who was judicial tenant of a farm in county Tyrone, and had £300 in a New York savings bank, read an advertisement of the sale by public auction of a house and premises held by the plaintiff under a lease of the 14th September, 1891, for the term of thirty-three years, at the yearly rent of £32. The premises were stated to be in the occupation of two tenants of the plaintiff, whose names and rents were given, and a profit rent of £36 5*s.* was shown. There follow some particulars describing the tenants as solvent men carrying on large and remunerative businesses, and adding that portion of the premises held by one of them is licensed for the sale of wine and spirits. There is no statement of the nature and extent of the tenancies, and nothing to suggest that the purchaser would be entitled to obtain possession by service of a notice to quit or otherwise. On the contrary, the reasonable inference from the document, taken as a whole, is that what is called in it "a sound investment" consisted of well-paid rents. The advertisement ended by inviting private proposals to purchase previous to the auction, such proposals to be sent to Messrs. Dickie & Carson, a firm of solicitors of high standing in the North of Ireland.

The defendant, having read this document, wrote on the 9th October to this firm, asking the lowest price for the premises advertised, the reply to which was, that the solicitors would receive but would not make an offer, whereupon she wrote offering £500. By letter of the 17th October, this was accepted by Messrs. Dickie & Carson, subject to the conditions of sale, and the defendant was asked to come at once to sign the conditions and pay the deposit of £25 per cent. of the purchase-money as provided in the advertisement.

On the 19th October, the defendant came into Omagh, and after seeing her own solicitor, Mr. Donnelly, she visited the office of Messrs. Dickie & Carson. There is a curious conflict of

testimony as to what then occurred, but there is no doubt that she there signed the conditions of sale, the 13th of which specified, with perfect accuracy, the tenure of the plaintiff's tenants. It appeared therefrom that while the other premises were held from year to year, the public-house was the subject of a lease of the 17th December, 1897, for the term of twenty-two years, from the 1st January, 1898. She said that she would come back the next day to pay the deposit of £125, and in the meantime she gave an I. O. U. therefor. On the 20th October she returned with the manager of her bank, who explained that she had lodged with him a deposit receipt for £300, given her by a New York savings bank, but that he could not cash it before communicating with New York, that he would do so at once, and that in the meantime she would give her cheque for the amount of the deposit to be paid when the money came to her credit in Omagh. Nothing more took place until the 1st November, when she, with the bank manager, once more appeared in the solicitors' office and said that she had stopped her cheque inasmuch as she had determined not to proceed with the purchase. There is, I think, no doubt that this was the result of an interview she had with the lessee of the public-house, who led her to believe that she had agreed to pay too high a price.

In this state of things, the present action was brought to recover the deposit of £125 which was to have been paid on the making of the agreement; and the only defence relied on is that she is not bound thereby, inasmuch as the particulars contained in the advertisement were misleading, and that she was induced to enter into the agreement and give her I. O. U. for £125 without any knowledge that the most valuable portion of the premises was sub-let for a long unexpired term.

Now, on the facts which I have stated, and which are not in controversy, I have no doubt that this defence must fail. The advertisement states expressly that the premises were in the occupation of tenants, but contains nothing from which the nature of the tenancies could be inferred. It intimates that the purchaser must sign conditions of sale, and pay a specified portion of the purchase-money as a deposit.

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The defendant was asked in the solicitors' letter of the 17th October, which accepted her offer subject to the conditions of sale, to come to the office on receipt of the letter and sign the conditions. On the next day but one she arrives at the office, signs the conditions containing express notice of the lease of the public-house, gives her I. O. U., and says that she will pay the amount to-morrow. Assuming that when she read the advertisement she believed that the premises were held by yearly tenants, how can this be used to cancel an agreement stating clearly the true nature of the tenancies, unless she can show that she was led to execute it by fraudulent concealment or misrepresentation of its contents? But so far from this being pleaded, the defence is confined to what is contained in the advertisement. The defendant herself when giving her evidence seems to have seen this difficulty, and to have attempted to meet it by an ingenious but incredible account of what happened in the solicitors' office on the 19th October. She had come there in reply to a request to execute the conditions of sale. She had seen her own solicitor immediately before. She met for the first time Mr. Dickie, a solicitor of high standing, and his manager, Mr. Robb. She does not say that she asked for any information about the tenancies, or that there was any oral information given to her in reference thereto. She does not say that she signed the conditions of sale without reading them or hearing any of them read. She admits that Mr. Dickie purported to read them, including condition 13, and that she heard everything contained therein relating to the tenancies from year to year, but she denied that he read the portion thereof that gave the particulars of the lease of 1897.

Mr. Dickie and Mr. Robb swore that not only were the whole of the conditions read, but that the sub-lease was produced; that the date of its expiration was calculated, and that the nature of the tenancies was fully discussed. The defendant's story is so incredible that I cannot believe that it would be accepted by any reasonable man; but her counsel contend that the jury found it to be true. The course of the trial was unsatisfactory, and it is difficult to ascertain the view finally taken by the jury. They were first asked three questions—(1) Were the particulars of sale

misleading? (2) Was the defendant in fact misled? and (3) Was there a contract in fact? After some consideration the jurors returned, and said that they could not agree as to (2), but that they might agree if they were at liberty to answer yes to (3). It would seem to me that this was consistent with the view that even if the defendant drew an erroneous inference as to the character of the tenancies from the advertisement, this was corrected before she signed the conditions of sale.

The judge thereupon withdrew the third question, and substituted for it three or four others. The effect of this was, in my opinion, to make the case depend upon the advertisement, even although the defendant was given full information by the conditions of sale.

I am of opinion, and I am prepared to decide, that at the conclusion of the evidence the Judge ought to have yielded to the application of the plaintiff's counsel to direct a verdict for his client, for the simple reasons that the defendant by executing the conditions of sale had notice of everything contained therein, including the character of the tenancies, unless she could establish that fraudulent concealment or misrepresentation had prevented her from acquiring this knowledge, and that she was not at liberty to rely on such fraud, as it was not pleaded. Indeed, I gather from the Judge's notes that no attempt was made to rely on it at the trial, and that it was not considered by the jury.

At the same time, while I would be satisfied to rest my judgment on these propositions, I agree with Lord O'Brien that the absence from the advertisement of any reference to the publican's lease would not be a legal ground for repudiating the agreement, even if the omission had not been supplied by the conditions of sale.

The defendant was distinctly told by the particulars, which led to her offer, that the premises were all in the occupation of tenants paying specified rents. I see no reason for her assuming that they were yearly tenants, or for her alleging that she was misled when it appeared that one tenancy was for a term of years. Premises of this kind in a country town are as likely to be held for a term of years as from year to year. It would have been just as reasonable for her to have alleged that she was misled by inferring that

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tenants represented as good rent-payers could have surrendered their holdings by serving notices to quit, and I am not sure from her evidence that this is not part of her complaint. In the absence of authority, I should hold that the true rule of law is that, when a purchaser is informed by the vendor that the premises are held by tenants at certain specified rents, it is for him to inquire what their tenure is; and that he cannot complain that he has been misled if he afterwards discovers that such tenure is greater than what he, without any reason, assumed it to have been. *Carroll* v. *Keayes* (1) establishes, as far as this Court is concerned, a principle much stronger than this. That case was very exhaustively discussed in the Vice-Chancellor's Court, and afterwards in the then Court of Appeal. In it a purchaser had agreed to buy premises on part of which there were certain yearly tenants; but the vendor seems to have given him no notice thereof. It was, however, held that the vendee, on visiting the lands, had ascertained that these persons were in occupation of portion of them, but that he was not aware of the nature of their occupation. It was held that, inasmuch as the evidence showed him to have had notice of the tenancies, and not to have objected to them previous to the signing of the agreement, he must be taken to have purchased subject to them, and that the vendor was entitled to have the agreement specifically performed. The case before us is in every respect much stronger in favour of the plaintiff; and what gives *Carroll* v. *Keayes* (1) even greater importance is, that it expressly approves of the decision of Lord Romilly in *James* v. *Lichfield* (2), which I think cannot be distinguished from the present case. The only real answer that has been given to the application of these authorities to the present action is that they are inconsistent with *Caballero* v. *Henty* (3). I may say that if this is so, I think we must follow our own Court of Appeal. But I also think that the facts are very different. No doubt in that case the particulars of sale stated that the premises to be sold were in the occupation of a tenant at a low rental; and it was decided that the purchaser

(1) I. R. 8 Eq. 97.
(2) L. R. 9 Eq. 51.
(3) L. R. 9 Ch. App. 447.

was not bound to ascertain the terms of the tenancy, and that as it appeared that the premises were held for a term of years, the vendor could not enforce specific performance.

There were, however, three points of distinction between that and the present case. In it—(1) the particulars conveyed that what was offered for sale was a public-house as a concern in which the purchaser could carry on the publican's business; (2) the purchase was made by an agent who had no authority to purchase a public-house sub-let for a term of years; and (3) there was no reference in the signed agreement to the lease. I can hardly believe that the Lords Justices would have come to the same conclusion in a case like the present; but it is enough for me to say that I prefer to follow our own Court of Appeal.

CHERRY, L.J. :—

I concur. In my opinion there was nothing whatever misleading in the advertisement; and even if there was, I do not think that the defendant, having signed an agreement which incorporated the conditions of sale, could now complain of being misled by the advertisement. The conditions of sale fully set out all the facts as regards the tenure of the premises. In *Caballero* v. *Henty* (1), there was no such agreement signed; and that fact completely distinguishes that case from the present one. In any event *Carroll* v. *Keayes* (2) is an authority directly in point, and clearly binding upon this Court. Even if it is inconsistent with the judgment of the English Court of Appeal in *Caballero* v. *Henty* (1) (which, however, I do not think it is), we are still bound to follow it in this country.

Solicitor for the plaintiff: *P. M. Seales.*
Solicitor for the defendant: *A. E. Donnelly.*

W. G.

(1) L. R. 9 Ch. App. 447. (2) I. R. 8 Eq. 81.

K. B. Div.
1910.
Jan. 28.

RYLAND'S GLASS ENGINEERING COMPANY, LIMITED, *v.* PHŒNIX COMPANY, LIMITED (1).

Practice—Prematurely marking judgment—Service of writ by posting—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 116—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *sect.* 26.

Plaintiffs, who could lawfully have effected service of a writ against a defendant company by posting the same in a prepaid cover properly addressed, for greater certainty registered the same; in consequence of such registration the letter was not in fact delivered until the day following the "ordinary course of post." The plaintiffs *bona fide* believed that the letter had been delivered in the ordinary course of post, and acting on such belief marked judgment in default of appearance immediately after the expiration of the period allowed for entering an appearance.

Held, on motion by the defendant company to set aside such judgment, that, notwithstanding section 26 of the Interpretation Act, 1889, where the writ had not, in fact, been delivered in the ordinary course of post, the defendants were entitled to have the judgment set aside on the ground that it had been marked prematurely.

MOTION to set aside judgment by default as prematurely marked.

The plaintiff company issued a writ against the defendant company to recover the sum of £118 1*s.* 10*d.* for goods sold and delivered. The plaintiffs were a registered company, carrying on business as patent bottle manufacturers at Barnsley, Yorkshire, and the defendants were mineral water manufacturers having a registered address at 6 Empress Place, in the city of Dublin. Service of this writ might have been lawfully effected by posting it in an ordinary prepaid, properly addressed cover; but the plaintiffs, for greater certainty, effected service of the same by posting it on the 5th January, 1910, in a prepaid registered letter, addressed to the defendant company at their address aforesaid. This letter in the ordinary course of post for unregistered letters

(1) Before GIBSON and DODD, JJ.

should have been delivered on the same day. As a matter of fact, however, it was not delivered until the 6th January, 1910, the reason being that at the hour of the delivery, on the 5th, the defendants' offices had closed for the day, and the letter being registered could not be delivered until the following morning, which was the first occasion upon which the postman could get the customary receipt signed. The plaintiffs were not aware of this fact, and *bona fide* believed that the letter had been received by the defendants on the evening of the 5th January, 1910, and, acting on this belief, marked judgment on the 15th January in default of appearance.

Bartley, for the defendants:—

Section 116 of the Companies (Consolidation) Act, 1908, provides that documents may be served on companies by leaving them at, or sending them by post to, the registered address of the Company. By section 285 of the Act, "document" includes "summons, notice, order, and other legal process"; this includes writ. Section 26 of the Interpretation Act, 1889, provides that service by post "shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved." This section only relates to cases in which there is no evidence of actual service. Here it is proved and admitted that the document was not actually delivered until the 6th of January. In *M'Guire and Riordan* v. *Carey* (1) it was decided that service by post of a solicitor's bill of costs was effected at the time the letter was delivered, and not at the time the letter was put into the post office. In this case the letter containing the writ was registered, and on that account could not be delivered in the ordinary course of post, owing to the office of defendants being closed; but it was never necessary to register a letter in serving a writ on a company.

Andrews, for the plaintiffs:—

The Companies (Consolidation) Act of 1908 makes no alteration in the law. I submit the previous practice was to count service

(1) 30 I. L. T. R. 13.

K. B. Div. 1910.

RYLAND'S GLASS CO. *v.* PHŒNIX CO.

as from the day the letter containing the writ was posted; there is no default here on the part of the plaintiffs: the default, if any, is on the part of the Post Office officials; the contention of defendants ought not to prevail, as it would throw a most unreasonable burden on plaintiffs, and would place them at the mercy not only of the defendant company in each case, but also of the Post Office officials; section 26 of the Interpretation Act does not apply; this must be inferred from section 286 of the Companies (Consolidation) Act, 1908, which provides that the general application of section 38 of the Interpretation Act of 1889 is not to be prejudiced by anything in the Act.

The Court made the following order:—

> "It appearing to the Court that the writ was duly posted in a prepaid registered cover, properly addressed, and that it should have been delivered and received in the ordinary course of post on January 5th, 1910, and that the plaintiffs were justified in acting on that presumption, and in marking judgment, and did so in good faith; but it now appearing that the said writ so posted was not in fact delivered until January 6th, and that the said judgment was therefore marked prematurely, THE COURT DOTH ORDER that the said judgment and the registration thereof in the office of the Registrar of judgments be set aside at the plaintiffs' expense, and that the defendants do have up to Tuesday next, February 1st, 1910, to enter an appearance, and that each party do abide their own costs of this motion."

Solicitors for the plaintiffs: *French & French.*
Solicitor for the defendants: *M. J. O'Farrell.*

J. M.

THE KING (AT THE PROSECUTION OF P. J. O'NEILL, A. K. O'FARRELL, AND JOSEPH O'NEILL) *v.* R. J. NEWELL, AUDITOR OF THE LOCAL GOVERNMENT BOARD (1).

K. B. Div. 1910. Nov. 14, 15.

Local Government—Surcharges—Powers of auditor—Special payments by County Council to their county surveyor for acting as an expert witness on their behalf—Borough Funds (Ireland) Act, 1888 (51 & 52 *Vict. c.* 53), *ss.* 8, 10; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 17.

Notwithstanding the provisions in section 8 of the Borough Funds (Ireland) Act, 1888, where an auditor of the Local Government Board disallows and surcharges a payment made by a County Council in pursuance of a bill of costs taxed by a taxing officer of the House of Commons, the King's Bench Division has power to review such disallowances and surcharges upon *certiorari*.

Where a county surveyor attends the House of Commons by direction of and on behalf of his County Council to give assistance as an expert witness in opposing a bill before Parliament, such attendance as an expert is not within his ordinary duties, and he is entitled to a special fee therefor in addition to his ordinary salary.

MOTION to make absolute conditional order for *certiorari*.

The facts as set forth in the affidavits in the motion were as follows:—The County Council of the County of Dublin opposed the Dublin and Central (Ireland) Electric Powers Bill, 1908, and as a result of the opposition obtained amendments in the Bill for the protection of the County Dublin interests. The costs incurred in such opposition were, on the requisition of the County Council, duly taxed, and the certificate of the Taxing Officer of the House of Commons, issued on the 11th March, 1909, for the sum of £812 12*s.* in respect of the amount allowed for said costs, and in addition a sum of £15 1*s.* 6*d.*, was allowed for the costs and fees of taxation. The costs as taxed, and the certificate of taxation, were submitted to the County Dublin Council, who, by resolution dated 1st April, 1909, directed payment thereof, and accordingly

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the same were included in the paying order, dated 1st April, 1909, and paid accordingly. The foregoing costs contained a sum of £18 18*s.*, in addition to travelling expenses allowed to William Collen, County Surveyor for the County of Dublin, for his attendance during six days in London on behalf of the County Dublin County Council in their opposition to the aforesaid Electric Powers Bill, 1908, and the Taxing Master of the House of Commons had allowed the said County Surveyor a sum of £3 3*s.* per day for the said six days, this being the fee that had always been allowed to the said County Surveyor since his appointment when required to attend in London on behalf of his County Council in connexion with any Parliamentary Bill. Subsequently, in April, 1910, the aforesaid costs as taxed, and the certificate of taxation, came before the Local Government Board Auditor, Mr. R. J. Newell, in connexion with his audit of the accounts of the Dublin County Council, and he, on the 27th April, 1910, put the following note on the certificate :—" Examined and allowed under section 8 of the Borough Funds (Ireland) Act, 1888, save so far as the sum of £9 9*s.* referred to at page 70 is concerned—R. J. Newell, Local Government Auditor, 27th April, 1910 " ; and on the bill of costs the Auditor put this further note :—" The allowance to Mr. Collen is reduced by £9 9*s.* to the sum of £14 19*s.*" ; and he surcharged this sum of £9 9*s.* against the three members of the County Council who had signed the paying order, which included the amount of the costs so taxed and certified, namely, the chairman, Mr. P. J. O'Neill, and Messrs. A. K. O'Farrell, and Joseph O'Neill. On the book of accounts and expenditure he stated his reasons for the disallowance and surcharges as follows :—" My reasons for making the foregoing disallowance and surcharge of £9 9*s.* are that this sum represents a payment to the County Surveyor for expenses as a witness in excess of the amount which he was entitled to be paid under this head." It appeared from the affidavit of the solicitor to the County Council that Mr. Collen attended in London as a professional witness on behalf of the Council, and that during his absence his work had to be done by a deputy whom he had to pay, for which there was no provision in his office. The members of the County Council who were surcharged, namely, Messrs. P. J. O'Neill, A. K. O'Farrell, and Joseph O'Neill,

obtained a conditional order for a writ of *certiorari* to remove into the King's Bench for the purpose of being quashed the orders of disallowance and surcharge aforesaid upon the following grounds :—(1) That such disallowances and surcharges were made without and in excess of jurisdiction ; (2) that the reasons given by the said Auditor for the said surcharges were not good and sufficient in law ; (3) that the question of reasonableness and propriety of the payments and allowances so disallowed and surcharged was fit and proper to be decided by the Taxing Master of the House of Commons, and was so decided by him, and that his certificate thereon was conclusive on that question ; (4) that the surcharges were made without and in excess of legal authority. Mr. Newell, in an affidavit showing cause, stated that Mr. Collen was paid his salary at the rate of £850 per annum for the six days he was in attendance at London, and that he was of opinion that Mr. Collen was not entitled to be paid £3 3*s.* per day in addition to his salary, and that he considered a subsistence allowance of a sum of £1 11*s.* 6*d.* per day over and above his travelling expenses was a reasonable sum to allow him, and that he accordingly reduced the said payment by £9 9*s.*, and made the disallowance and surcharges as stated above.

Ronan, K.C. (with him *Timothy Sullivan*), moved to make absolute the conditional order :—

The auditor has really re-taxed a taxed bill. Though sect. 8 of the Borough Funds (Ireland) Act, 1888, provides that all costs incurred under the provisions of the Act shall, before the same become chargeable, be examined and allowed by an auditor of the Local Government Board, still section 10 of the same Act contains a provision that nothing in the Act shall extend or be construed to take away or diminish any rights or powers now possessed or enjoyed by any governing body. The County Council had power to oppose this Bill : sect. 17 of the Local Government (Ireland) Act, 1898. The county surveyor was engaged, while in London, as an expert witness. [Counsel referred to *The King* (*Kennedy*) v. *Browne* (1).] This Court has power to

(1) [1907] 2 Ir. R. 505.

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consider these disallowances and surcharges upon a *certiorari*: sect. 12 of the Local Government (Ireland) Act, 1871.

D. S. Henry, *K.C.* (with whom were *Powell*, *K.C.*, and *T. Henry Maxwell*), for Mr. Newell:—

The view of the auditor was, that the duties performed by the county surveyor in London formed part of his work: Articles 43 and 44 of the Adaptation of Enactments Order of 30th January, 1890. The Council can appoint a deputy to perform the duties of a county surveyor during his absence: Local Government (Ireland) Act, 1898, sect. 83, sub-sect. (2). [Counsel referred to *The King* (*King-Kerr*) v. *Newell* (1).]

PALLES, C.B.:—

We are of opinion that we have jurisdiction to entertain this application notwithstanding the obligation created by sect. 8 of the Borough Funds Act, 1888, of the costs being examined and allowed by an auditor of the Local Government Board. That Act of 1888 is subsequent to the Act of 1871, and is *in pari materia* with it; and we hold that the performance of the duty thereby imposed on the auditor is one of the matters which, under the Act of 1871, may be reviewed by this Court upon *certiorari*. We are further of opinion that the duties of this county surveyor do not include, or contemplate, his attendance as an expert witness before either house of Parliament, and that under all the circumstances of the case his attendance there on the occasion in question was as an expert witness, and that the allowance of £3 3*s*. a day is not unreasonable. We therefore over-rule the decision of the auditor, and direct that this sum in question shall be allowed. The auditor will have his costs out of the rates in the ordinary way.

GIBSON and BOYD, JJ., concurred.

Solicitor for the appellant: *W. J. Shannon.*
Solicitors for the auditor: *Allen & Halpin.*

J. M.

(1) [1903] 2 Ir. R. 335.

WILLIAM LYONS AND PATRICK BROWNE *v.* MARY ANNE O'BRIEN (A PERSON OF UNSOUND MIND, BY DANIEL O'BRIEN, HER GUARDIAN) (1).

K. B. Div. 1911. Feb. 1, 2, 27.

(1909. No. 14593.)

Tort—Money wrongfully appropriated—Ratification of wrongful act by true owner—Money applied by the tortfeasor in discharging liabilities of her husband—Assumpsit—*Money had and received—Liability of the estate of deceased husband to refund the money taken.*

A volunteer receiving money, belonging to another, from a person who has obtained such money by a wrongful act, made rightful by imputed consent, resulting retrospectively from such ratification, cannot hold the money as against the true owner. Such volunteer is liable, like the person from whom he obtained the money, and cannot be in a better position than he would have been had the person, through whom the money was obtained, been the agent of the true owner to apply the money to a specific purpose, other than that of giving it to such volunteer.

A., a married woman, having misappropriated a deposit receipt for £100, belonging to her father, cashed the same with a trader to whom her husband was indebted, obtaining therefor the sum of £111 0*s.* 1*d.*, the proceeds of the deposit receipt with interest. In an action, instituted by the executors of A.'s father against A. as administratrix of her deceased husband, and also in her personal capacity, to recover the said sum of £111 0*s.* 1*d.*, evidence was given that, on the discovery by A.'s father of the loss of the deposit receipt, A. had told her father she had taken it, and that the money would be put back, upon which information A.'s father ceased to treat the appropriation of the deposit receipt by A. as a theft. Evidence was also given by one of the plaintiffs that A. and her husband had given a promissory note to repay the amount of the deposit receipt, but at the trial of the action no such note was produced, and it was alleged that this note had been taken from A.'s father a few days before his death. It was admitted that A. had applied the proceeds of the deposit receipt in discharging liabilities of her husband as his agent. The jury having found that the deposit receipt had been wrongfully appropriated by A., judgment was entered for £111 0*s.* 1*d.* against A. as administratrix of her deceased husband and in her personal capacity. No other question was asked to be submitted to the jury. On a motion to set aside the judgment as against A.

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as administratrix, *Held*, that it must be inferred that A.'s father had ratified the appropriation by A. of the deposit receipt, and the conversion by her of the same into cash, and also, that A.'s husband adopted the acts of his wife as his agent, and that upon such inferences and upon the admissions, the proceeds of the deposit receipt being in the hands of A. as money received by her to the use of her father, the husband, during his lifetime, would have been liable to an action for money had and received to the use of the father, and, therefore, judgment should be against the defendant A. as administratrix of her husband as well as in her personal capacity.

MOTION to set aside portion of a judgment, and in the alternative for a new trial.

The action in which the judgment sought to be set aside was entered was brought by William Lyons and Patrick Browne, executors of one Hugh M'Craith, deceased, against the defendant, Mary Anne O'Brien, who was sued both in her personal capacity and as administratrix of her husband, John O'Brien, deceased, to recover the sum of £111 0*s.* 1*d.*, as money payable by the defendant to the plaintiffs for money received by the defendant for the use of Hugh M'Craith, deceased, and money owing to the said Hugh M'Craith on foot of an account stated. The sum claimed, as set out in the particulars stated in the statement of claim endorsed on the writ, was claimed as made up of two several items, namely, (1) the sum of £111 0*s.* 1*d.*, being the amount with interest to date of payment of a deposit receipt in the Provincial Bank at Clogheen in the County of Tipperary, in the name of the said Hugh M'Craith, and alleged to have been paid on the 19th of January, 1905, to the defendant for the use of Hugh M'Craith; and (2) the sum of £10, alleged to have become due to Hugh M'Craith by the defendant upon the defendant's I. O. U. upon the 22nd of April, 1905.

The defendant, by her defence, traversed the allegations in the statement of claim, and pleaded that, if there was a deposit receipt in the name of Hugh M'Craith as alleged, and if she cashed the proceeds thereof (all of which she denied), such deposit receipt was given, paid, and the proceeds thereof retained by her as her own money under a gift from Hugh M'Craith. The action was first tried on the 11th of May, 1910, by Mr. Justice Dodd and a common jury of the County of the City of Dublin. At the close

of the trial the following questions were submitted to the jury by the learned Judge:—

(1) Did the deceased, Hugh M'Craith, make a gift of the deposit receipt for £100 to the defendant?

(2) Was the money received by the defendant applied by her as her husband's agent, in paying liabilities of the defendant's husband?

(3) Did the defendant's husband sign a promissory note for £100 to the deceased?

(4) Was the deposit receipt for £100 given by deceased to defendant, and received by her, as agent for her husband for the payment of her husband's liabilities?

Upon these questions the jury failed to agree, and the action was re-tried on the 28th and 29th October, 1910, before the Right Honourable the Lord Chief Justice of Ireland (Lord O'Brien) and a special jury of the County of the City of Dublin.

The following was the evidence given at the second trial, as appearing in the note of the learned Lord Chief Justice.

W. Lyons, one of the plaintiffs—"I lived five or six miles from Hugh M'Craith's house. The defendant's husband has been dead for three years. Hugh was ill in 1902. When he endorsed all his deposit receipts in January, 1905, I received a message from Hugh. When I went in defendant and her husband were in the room. Hugh told me he felt bad over money taken. I said 'It will be all right'; they will give it to you. He said they promised to pay it back. They said of the £100 they had paid £50 to O'Brien of Ballyporeen in part payment of a debt due to him by John O'Brien, for which he had been threatening to sue, and they had spent the other £50 on payment of workmen whom John O'Brien had working on the roads, he being road contractor to the Tipperary South Riding County Council. He said he first thought of asking me to go for Casey, the solicitor, to prosecute the defendant. The defendant said they would give a note to pay it back, and John O'Brien said he could sign it. The deceased called Ellen M'Craith, who was in the house, and sent her to Ballyporeen, six miles away, for a bill stamp to draw it. Ellen came back after three or four hours. John O'Brien drew up the bill. He signed

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it, and his wife signed it, and it was given to Hugh, who wrote something on it. It was a promissory note to give back the £100 on demand. The deceased got me to witness it; he put it in a cash box. A fortnight before he died I was at the house about the habit. I asked him for money. He took the cash-box, opened it, and gave me £1, and showed me the contents of same, and told me the promissory note was there, and to be sure to get it, and give £50 of it to the imbecile (Hannah). There was a bundle of bank notes in it. On the evening of the 29th Mrs. O'Brien, the defendant, was at the deceased's house. I was told that the cash-box was broken. I met her in the yard and put it to her it was robbed. She said, 'What has that to do with you?' She said she would give me no satisfaction; it was her father's money, and that I could go looking for it and the £100 as well. This incident was a conversation between Casey, the solicitor, and defendant, in the former's office, at which Browne, Pat M'Craith, and I were present. Browne told me he had arranged to keep £50 and give her time for the balance. I asked her about the I. O. U. for £10. She replied her father owed her £10. I then asked her why she signed the I. O. U.; she then denied having signed it. I then showed the note to Pat M'Craith, when she admitted she signed it. To the time of his death she was visiting the old man at his request, off and on, at the house."

Pat M'Craith, brother of the defendant: — "On the 11th June, 1904, I got my hand gored by a bull, when I was unable to write. The deceased man made some alarm on that morning about the deposit receipt, and asked my sisters Ellen and Nora about it." [Mr. Sullivan, K.C., on behalf of the defendant, objected to evidence being given of any statements made by the deceased in reference to the deposit receipt, but the evidence was admitted, subject to the objection.] "On the 31st December, 1904, I dictated a letter from my father to Newport, the manager of his bank at Clogheen. My father looked after the box, and missed the deposit receipt, and asked had we seen it or taken it. I had not been asking about the deposit receipt. A reply was received on the 2nd January, 1905, to my father's letter. Some time later I was sent into Newport to tell the manager of the bank that my father had missed a deposit receipt, and if anyone

went to cash it not to do so." [The letters were allowed to be entered, subject to objection by Mr. Sullivan.] "I met the defendant near Ballyporeen, and told her my father had missed a deposit receipt, and was sending to the bank to notice them not to pay it. She said she had taken it; to go home and tell the father she would make it all right. My father felt very annoyed over it. I do not recollect any word he said. Ellen went to America in April, 1909. In April, 1909, the defendant came to my father's house, and said to my father she wanted a loan of £10, that she had written by Lyons for £20. The deceased then got me to endorse a deposit receipt, and give it to the defendant. . . . My father's last illness was on the 22nd May, when the defendant, Mrs. O'Brien, came. She left on Friday, the 28th. My father died on the 29th. The cash-box used to be alongside his bed, with the key hanging from the pocket of his waistcoat, at the end of the bed. I had £15 for cattle sold for the deceased, which was put in the box. I subsequently missed some money out of the box, and spoke to the defendant about it.

Daniel Casey, the plaintiffs' solicitor: — "I knew Hugh M'Craith. He was a very intelligent farmer. Mrs. O'Brien came to my office on the 19th July. By her father's will she was entitled to a half railway-share. On the 19th she asked me to have her father's will read. I was reading it when Pat M'Craith, W. Lyons, and P. Browne came in. I then read it over again for the whole of them. She then asked for the half share. I said, 'There is the matter of this deposit receipt for £100.' She replied, 'Whatever dealings father and I had are no affairs of yours.' I said, 'Are you going to pay back the deposit receipt for £100?' She said, in the end, instead of owing him money, he owed her money, as she had lent him £10 when her sister Ellen was going to America. I then showed her the I. O. U. of a later date, and asked her, if her father owed her £10, why did she sign it. She then denied having signed it. Patrick then said he saw her sign it, when she admitted having signed it. As regards the deposit receipt, Browne said, 'We have settled that. Mrs. O'Brien is to allow her half railway-share on account, and she will pay the balance by instalments. If she does not, I will be the first to go against her.'"

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The defendant:—"I received as marriage-portion £125. My sister, Bridget Lyons, received £235. I had always lived on the most friendly terms with my father, both before and after marriage; and, close to the time of his death, I had stayed in his house, a week or ten days before his death, attending him. My son was adopted by him, and the latter lent me money in 1909. Things did not prosper with me. I became heavily indebted, principally to a shopkeeper in Ballyporeen, named Michael O'Brien. I constantly spoke to my father of my indebtedness. He knew of my embarrassed circumstances, and frequently promised to do something for me. At the end of 1904, my father was ill. I reminded him of his promise, and asked him for assistance. He told me to take down an envelope from the mantel-piece. He took out of it a deposit receipt for £100, signed it, and gave it to me, saying, 'This is a private gift; say nothing about it.' My father never referred to the deposit receipt again. I lived on the same friendly terms with my father after the gift as before. I had no conversation with my brother with reference to the deposit receipt. I disposed of portion of the proceeds in paying off portion of the debt due to M. O'Brien. I cashed the deposit receipt with O'Brien. The balance was used by my husband in carrying out his road contracts. Neither I nor my husband ever signed a promissory note for £100. There was no meeting in my father's house with reference to the deposit receipt. I never admitted the claim to, or agreed to settle down with, Browne."

The plaintiff Patrick Browne:—"There was no settlement of the claim between me and the defendant. The defendant never agreed to set off the half share in the railway company, left her under the will, in part payment of the deposit receipt."

The following are the letters referred to in the evidence of Pat M'Craith:—

"31*st December*, 1904.

"DEAR SIR,—Please let me know by return of post how many deposit receipts should I have in the Clogheen Bank. I miss a deposit receipt for £100. Should anybody want to cash it, please let me know. Please stop payment at any other bank.

"Yours faithfully,

"HUGH M'CRAITH."

"19*th January*, 1905.

"DEAR SIR,—In your letter of the 31st ult., you stated that you had mislaid your deposit receipt for £100. It has since been cashed at the Bank of Ireland, Mitchelstown, and you should have advised me of its being found.

"WM. NEWPORT, *Mngr.*"

The following letter from the deceased, Hugh M'Craith, was also put in evidence:—

"BARNAHOWN ARAGHLEN, KILWORTH.

January 23rd, 1905.

"DEAR SIR,—I see by your letter of the 19th inst. that this money has been cashed at the Bank of Ireland, Mitchelstown. I am told by one of my children that this money will be put back again, and also the interest on it. If so, we will say no more about it. Please let me know what is the amount of the interest.

"Yours faithfully,

"HUGH M'CRAITH."

At the close of the trial the claim with respect to the I.O.U. for £10 was abandoned, and the following question only was put to the jury, namely—"Did the defendant wrongfully appropriate the deposit receipt for £100?" The jury answered the question in the affirmative.

The following memoranda were handed in respectively by senior counsel for the plaintiffs and defendant. On behalf of the plaintiffs Serjeant Moriarty, K.C., requisitioned that "The defendant is sued as administratrix of John O'Brien, deceased, and in her personal capacity. By her defence the defendant does not deny her representative capacity, nor does she plead want of assets or *plene administravit*. In her evidence the defendant swore she applied the £111, the proceeds of the deposit receipt, to payment, so far as £50, of a debt of her husband, John O'Brien, and the rest of the proceeds of the deposit receipt, £61, towards the roads of which her husband

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was the contractor. The whole of the money was therefore applied for the use and benefit of the said John O'Brien, and became a debt due by him to Hugh M'Craith. The course of the trial was on the basis of the defendant's statement that the money was so applied. I relied on defendant's statement, and abstained from calling (at Mr. Sullivan's suggestion) Michael O'Brien to prove how the money was applied as to £50 and what the defendant told him as regards the balance. I did not ask the Judge to leave any question to the jury as to how the money was applied—as Mr. Justice Dodd did at the last trial—as it was agreed that only one question should be left to the jury. I therefore submit that on the pleadings, defendant's evidence, and the course of the trial, I am entitled to judgment against the defendant as administratrix of John O'Brien deceased for £111 (and interest since January, 1905), out of the assets of John O'Brien deceased, and, if not realized, against herself in her personal capacity."

The following was the memorandum handed in by Mr. A. M. Sullivan, K.C., on behalf of the defendant:—"On behalf of the defendant both personally and as representative, I submit that the I. O. U., being an account stated, is a debt due and payable to the two named creditors jointly, and the survivor alone can sue (the Serjeant admits this). Upon that cause of action, therefore, judgment must be entered upon all causes of action. In *Capel* v. *Powell* (1), counsel argued that a divorced husband could not be joined with his wife as defendant in an action for tort committed by her during her coverture and before the divorce, on the ground that the termination of the coverture was the same as if he was dead, and it was so ruled by the Court. Erle, C.J., says that if the wife dies after an action has been commenced against her and her husband, the action abates; but if the husband dies, the action goes on against her. The only reason why the husband is joined at all is from the disability of the wife to sue or be sued alone. As soon as the disability ceases, the husband ought no longer to be joined. In *Earle* v. *Kingscote* (2) husband and wife were sued for the wife's fraud, and the husband pleaded

(1) 17 C. B. (N. S.) 743. (2) [1900] 2 Ch. 585.

that the fraud was directly connected with and parcel of a contract with the wife, which the Court agreed would be a good defence. Lord Alverstone, M.R., states the accepted law with respect to liabilities for *torts* disconnected with the wife's contract:—"It had been established for many years .... that an action lay against the husband during his lifetime for the wife's tort." The verdict of the jury establishes an act clearly *tortious*, which, if connected with any contract, would fall within the doctrine pleaded in *Earle* v. *Kingscote* (1), but, being a theft, is a tort only, and, therefore, in either event, the death of the husband ends his liability. Judgment should, therefore, be for plaintiffs, as against defendant personally for £111 and costs, and for defendant as administratrix on all causes of action with costs, and for defendant personally upon the I. O. U."

Judgment was entered for the plaintiffs for £111 0*s.* 1*d.* with costs, "said sum of £111 0*s.* 1*d.* and costs to be levied off the goods and chattels which were of the said John O'Brien, deceased, and if she has not so much thereof in her hands, then the balance of the said sum of £111 0*s.* 1*d.* and costs to be levied off the goods and chattels of the said defendant (Mary Anne O'Brien) in her personal capacity."

On the 28th November, 1910, the defendant served upon the plaintiffs notice of a motion to set aside the verdict in the following terms, *i.e.* that so much of the judgment directed to be entered by the Lord Chief Justice as ordered that the sum of £111 0*s.* 1*d.* and costs should be levied off the goods and chattels of John O'Brien, deceased, should be set aside, and that judgment should be entered in the manner and form set forth in counsel's requisition on the ground that "the Lord Chief Justice at the trial should have yielded to the requisition of counsel for the defendant as administratrix of John O'Brien, deceased, and entered judgment for said defendant in the dominical set forth," and, in the alternative, for a new trial of the action on the ground of the reception of illegal evidence tendered by the plaintiffs.

(1) [1900] 2 Ch. 585.

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A. M. Sullivan, K.C. (with him *Christopher Roche*), for the defendant:—

We admit that the question to be determined must be determined on the basis that the second question left to the jury by Dodd, J., at the first trial had been left to the jury at the second trial and answered in the affirmative. The agency admitted by this is, however, only the agency of the wife in the expenditure of the money stolen; it is no admission of agency on the part of the wife in taking the money. The husband is properly joined as a party in an action on the tort of the wife in cases of pure tort and during the coverture, but his liability for the tort of the wife determines with the determination of the coverture: *Capel* v. *Powell* (1); *Seroka* v. *Kattenburg* (2). In cases of pure contract the wife alone is liable, and where the case is one of mixed contract and tort, the husband is not liable where the fraud affects the wife's contract. This has been accepted as the law as late as 1900: *Wright* v. *Leonard* (3); *Liverpool Adelphi Loan Association* v. *Fairhurst* (4); *Earle* v. *Kingscote* (5).

If this case is to be determined on the ground of the tort or fraud of the wife, the liability of the husband has been determined by his death. The promissory note alleged to have been given by the husband and wife has not been proved. If the wife entered into a contract with her father, the husband is not made thereby liable. If the tort be waived and the case be treated as one of contract, the husband can only be rendered liable if the wife acted as his agent in the matter which gave rise to the contract, *i.e.*, the wrongful appropriation of the deposit receipt: *Keighley* v. *Durant* (6). If there is here a contract, it is a contract by the daughter to repay money received by the daughter on behalf of the father. She did not purport to take the money as her husband's agent: the money had all been expended before any charge was made to the husband, and there was no implied agency in the taking of the money. If there had been an act purporting

(1) 17 C. B. (N. S.) 743.
(2) 17 Q. B. D. 177.
(3) 11 C. B. (N. S.) 258.
(4) 9 Ex. 422.
(5) [1900] 2 Ch. 585.
(6) [1901] A. C. 240.

to be done on his behalf, he might afterwards have ratified such act. Here there was no such act and no ratification, merely a receipt of money. If the wife had stolen a bag of money, and that bag had been taken possession of by the husband, it might be trover; but not one farthing of the money expended was Hugh M'Craith's, and the deposit receipt for the £100 never came into the possession of the husband.

Serjeant Moriarty, K.C., and *Muldoon*, for the plaintiffs:—

The husband could be sued for money had and received: there is a moral obligation upon him to repay it *ex aequo et bono*: he had the benefit of it. If the wife had given the money to him, and he had put it in his pocket, he would have been bound to repay it (Pollock on Torts (ed. 1904), p. 528). The husband here is in exactly the same position as the surviving partner in Fauntleroy's Case, *Marsh* v. *Keating* (1). The husband's estate has been increased by the money taken by the wife, and it is admitted that she expended that money for his benefit. Assuming that the second question left by Dodd, J., had been left to the jury and answered in the affirmative, it involves the finding that the money was lawfully applied by the wife as agent of the husband. *Miller* v. *Race* (2) is an authority showing that money which found its way into the hands of the husband could be recovered as money paid. The rule as to current coin, made in protection of traders, should not apply to this case, where the money should be refunded *ex aequo et bono*. Trust money tortiously applied can be followed, and the consideration of these cases arises. The husband has got the benefit of something to which he was not entitled. If the money had been paid into a bank, the bank would have no answer unless the money had been paid out to another without notice. The cases, as regards money and bank notes, are collected at pp. 1153–1154 of Lewin (1911). The promissory note given by the husband and wife was not produced, but its absence is accounted for by the evidence that it was taken two days before the father's death. [Counsel also

(1) 1 Bing. (N. S.) 198. (2) 1 Sm. L. Ca. 463.

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referred to the following cases :—*Morley* v. *Loughnan* (1); *London Joint Stock Bank* v. *Simmons* (2); *Rice* v. *Reed* (3); *Bavins* v. *London and South-Western Bank* (4).]

Roche, in reply :—

The money here was never Hugh M'Craith's. The defendant cashed the deposit receipt with Michael O'Brien as her own money. *Marsh* v. *Keating* (5) has no bearing on this case. There is no evidence that the husband knew that the money was wrongfully taken, and the relationship of husband and wife is different from that existing between partners.

Feb 27.

PALLES, C.B. :—

Were the facts of this case such as gave rise to the able argument addressed to us by the defendant's counsel, there is much of it in which I should be inclined to agree; but, having regard to the facts admitted, and to those which I hold we must infer from the evidence, I am of opinion that the abstract questions of law which have been argued do not arise. The case is not one in which the ground of the liability sought to be imposed upon the assets of the deceased husband of the defendant is limited to the mere fact that she, in her husband's lifetime, wrongfully misappropriated her father's deposit receipt, so that under the law, as it existed before 1882, the necessity of joining her husband as a co-defendant with her in an action brought during their joint lives would have been for conformity only. Had this been so, had the deceased husband not received any benefit from the proceeds of the misappropriated deposit receipt, had there been no ratification by him of the application of that money to the payment of his debts, the case might, and, I think, would, have been different.

I must begin, therefore, by stating the facts upon which, in addition to the wrongful appropriation by the defendant of the deposit receipt, this case is to be decided. First, then, it is expressly admitted that the defendant swore at the trial that she applied the £111, the proceeds of the deposit receipt, to

(1) [1893] 1 Ch. 736.
(2) [1892] A. C. 201.
(3) [1900] 1 K. B. 54.
(4) [1900] 1 Q. B. 270.
(5) 1 Bing. (N. S.) 198.

payment, so far as £50, of a debt of her husband, and the rest of the proceeds, £61, towards the roads of which her husband was contractor. It is further admitted that the statement was accurate. Secondly, it is admitted that it is to be taken that if the second question left by Dodd, J., to the jury at the first trial had been left to the jury at the last trial, it should have been answered in the affirmative, that is to say, it is to be taken that the money received by the defendant was applied by her *as her husband's agent* in paying liabilities of her husband. It was explained to us in reference to this admission that the agency of the wife for her husband was admitted "as to the disposition only of the money, not as to its receipt"; and I take the admission in this limited sense. So much for admissions.

Now as to inferences.

I think it absolutely clear that Hugh M'Craith, the defendant's father, ratified and adopted the wrongful appropriation by the defendant of the deposit receipt, and her conversion of same into cash, and I infer such ratification and adoption as facts. Consequently the proceeds of the deposit receipt were in the hands of the defendant as money received by her to the use of her father. Again, if the admission I have referred to does not include it, I infer as a fact that the defendant's husband adopted the acts of his wife as his agent in applying her father's money so in her hands to the payment of his liabilities.

Under these circumstances I cannot doubt that after the application of the money to payment of his debts, the husband in his lifetime would have been liable to an action for money had and received by him to the use of his wife's father.

The subsequent ratification is equivalent to a prior direction, and money paid by the direction of the husband is in law a payment to him.

Further, a volunteer receiving money belonging to another, from a person whose *prima facie* wrongful act has been made rightful by imputed ratification resulting retrospectively from consent of the owner, cannot hold such money as against such owner: *Neate* v. *Harding* (1), judgment of Parke, B. Such volunteer is liable in the same manner as is the person from whom he obtained

(1) 6 Exch. 351.

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the money. He cannot be in a better position than he would have been had the person through whom the money came been the agent of the true owner to apply the money to a specific purpose other than that of giving it to such volunteer. This is sufficient to decide this case, and upon this ground Gibson, J., concurs with me that the judgment for the £111 must be against the defendant as administratrix of her husband as well as in her personal capacity.

But there are many other views on which, were it necessary, I should individually be prepared to hold that the husband was liable; but as I have not had an opportunity of discussing them with my brother Gibson, they are not to be attributed to him.

For instance, I should have been prepared to hold that there is evidence that the wife was the husband's agent to obtain money as best she could to pay such of his debts as she, in fact, paid, and that consequently, although the husband did not contemplate her obtaining it illegally, the knowledge of the wife that the moneys applied in payment of those debts were her father's money and were so applied without his consent, was the knowledge of the husband. Indeed in that event the money would have been from its receipt in the hands of the defendant as her husband's agent. Again, although I am not aware of any authority upon the point, I should have held, if necessary, that the doctrine of subrogation would apply, and that the father in his lifetime was, and that the present plaintiffs as his personal representatives are, entitled to stand against the husband in the position of his creditors who were paid out of the money of the father.

The judgment will be slightly altered in a matter of form which was not controverted, and as to the £10 to which the claim was abandoned at the trial will be for the defendant with the costs applicable thereto, but as to the £111, the amount of the deposit receipt, it will be for the plaintiff with costs against the defendant, as well as administratrix of her husband as in her personal capacity.

GIBSON, J., who was absent when judgment was delivered, concurred.

Solicitors for the defendant: *W. E. O'Brien.*

Solicitors for the plaintiffs: *Coughlan & Casey.*

C. N. K.

THE KING (JAMES McCLEAN, SAMUEL W. KENNEDY, AND JOHN H. POLLOCK) *v.* HIS HONOR THE RECORDER OF THE COUNTY OF THE CITY OF LONDONDERRY (1).

K. B. Div. 1911. April 20, 25.

County Court—Jurisdiction—Building Societies Act, 1874, *sects.* 4 *and* 32, *sub-sect.* 4 (37 *&* 38 *Vict. c.* 42)—*Winding up of a building society—Jurisdiction of a Recorder or County Court Judge to summon before him for examination and to examine directors or officers of a building society being wound up under the supervision of his Court—Implied incorporation of winding up procedure of the Companies Acts with the Building Societies Act*, 1874 (37 *&* 38 *Vict. c.* 42)—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89)—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69).

An order having been made by the Recorder of Londonderry, under section 32, sub-section 4, of the Building Societies Act, 1874 (2), to wind up under the supervision of his Court a Building Society registered under that Act, upon an application of the liquidators, summonses were issued to certain of the directors of that society to appear before the Recorder for examination, upon an application by the liquidators for directions with respect to proceedings against the directors or officers, or some of them, for misfeasance or breach of trust in the management of the affairs of the society being wound up. Upon motion of three of the directors so summoned to make absolute a conditional order for the issue of a writ of prohibition directed to the Recorder to prohibit such examination by him, it was held that the statutory jurisdiction to wind up Societies

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(1) Before PALLES, C.B., and KENNY and WRIGHT, JJ.

(2) 37 & 38 Vict. c. 42. Section 32 of this Act provides that "A society under this Act may terminate or be dissolved. . . . (4) by winding-up, either voluntarily under the supervision of the Court, or by the Court, if the Court shall so order, on the petition of any member authorized by three-fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society, or on the petition of a judgment creditor for not less than £50, but not otherwise. General Orders for regulating the proceedings of the Court under this section may be, from time to time, made by the authority for the time being authorized to make General Orders for the Court."

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registered under the Building Societies Act, 1874 (1), conferred exclusively upon the Civil Bill Court in Ireland, by sections 4 and 32, sub-section 4, of that Act, carried with it everything necessarily incidental to the effective dissolution of a Society wound up thereunder, and to the ascertainment and distribution of the assets of such Society by the Civil Bill Court, and that such exclusive statutory jurisdiction was only exercisable by some statutory mode of procedure for the winding-up of bodies incorporated by statute, known to the Legislature at the passing of the Building Societies Act, 1874 (1); and that, therefore, notwithstanding that the Building Societies Act, 1874 (1), and the General Orders made thereunder did not expressly refer to or incorporate such provisions, the procedure for the winding-up of Companies, provided by the Companies Act, 1862 (2), as re-enacted by the Companies (Consolidation) Act, 1908 (3), were impliedly incorporated with the Building Societies Act, 1874 (1), and applied to the winding-up, by or before the Civil Bill Court, of Societies registered under the latter Act.

Held, accordingly, that under sections 174 and 215 of the Companies (Consolidation) Act 1908 (4), re-enacting sections 115, 117, and 165 of the Companies Act, 1862 (2), the Recorder of Londonderry had jurisdiction to summon before him for examination and to examine directors or officers of a Society being wound up before him under the Building Societies Act, 1874 (1), with a view to his determining whether there was such a *prima*

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(1) 37 & 38 Vict. c. 42. (2) 25 & 26 Vict. c. 89. (3) 8 Edw. 7, c. 69.

(4) 8 Edw. 7, c. 69. Sect. 174 of this Act, headed "Extraordinary Powers of the Court," provides that—

(1) "The Court may, after it has made a winding-up order, summon before it any officer of the company, or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company."

(2) "The Court may examine him on oath concerning the same, either by word of mouth, or on written interrogatories, and may reduce his answers to writing, and require him to sign them."

Section 215 provides:—(1) "Where, in the course of winding-up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or other officer of the company, has misapplied, or retained, or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore

facie case against them, or some of them, of misfeasance or breach of trust in relation to that Society, as would induce him to direct proceedings to be taken against them or some of them in the High Court.

Andrew v. *Swansea Cambrian Benefit Building Society* (50 L.J. (N.S.) C.P. 428) followed.

Held, also, *per* Kenny, J., that, adopting the decision of Vaughan-Williams, L.J., in *In re Portsea Island Building Society* ([1893] 3 Ch. 205), approving and following *Andrew* v. *Swansea Cambrian Benefit Building Society*, the enactments and practice in force at any time in the Chancery Division for the winding-up of Companies applied to the winding-up of Building Societies in the Civil Bill Court, even though such provisions might be the result of enactments passed since 1874.

MOTION to make absolute a conditional order for a writ of prohibition directed to his Honour the Recorder of Derry, prohibiting him from entering upon the examination of the directors or other officers of the Londonderry Mutual Building Society with regard to their acts or defaults in connexion with the said Londonderry Mutual Building Society (incorporated under the Building Societies Acts, 1874 and 1894). The Londonderry Mutual Building Society was incorporated under the Building Societies Acts, 1874 and 1894, and the certificate of incorporation was issued by the Registrar of Building Societies in Ireland on the 18th November, 1902. The first General Meeting of the Society was held at the office of the Society on the 19th December, 1902, and at that meeting a Mr. John Hassen was elected as first secretary of the society, and twelve directors appointed. Rules setting out the objects of the society were printed and issued to the members. The object of the society, as set out in Rule 2, was to raise, by subscription of its members, a fund out of which could be advanced to each member the

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the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company, by way of compensation, in respect of the misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

(2) "This section shall apply notwithstanding that the offence is one for which the officer may be criminally responsible."

(4) "So much of this section as refers to promoters, and to the property of a company other than money, shall not apply to a winding-up in Scotland or Ireland."

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sum of £100 for each share, and a proportionate part of such sum of £100 for each fractional part of a share, held by such member, upon the security of freehold or leasehold estate by way of mortgage. The payment of a weekly subscription was required by Rule 5, and by Rule 6 it was provided that members might apply for advanced shares, all advances being made to the members on the security as stated in Rule 2, and not to exceed such amount as, in the opinion of the directors of the society, was the worth of the property offered as security in accordance with the surveyor's certificate. Rule 6 further provided that upon the advances under that Rule being made, the weekly subscription of members to whom such advances had been made should be increased. The rules also set out the names of the directors, and provided for guarantees being entered into by the officers of the society, and otherwise with respect to the management of the society.

On the 31st of May, 1910, at an extraordinary general meeting of the society a resolution was passed that the society should be voluntarily wound up under the supervision of the Court, and, in the following month of June, a petition carrying out that resolution was presented to his Honour the Recorder of Londonderry, praying for the voluntary winding up of the society under the supervision of the Court, in accordance with the provisions in that behalf of the Building Societies Acts of 1874 and 1894. On the 16th of June, 1910, an order was made by the Recorder upon this petition that the society should be wound up voluntarily under the supervision of the Court under the provisions of the Building Societies Acts, 1874 and 1894, and the Companies (Consolidation) Act, 1908, and that Patrick Campbell and Samuel Donnell should be appointed the liquidators of the society. By this order the liquidators were directed to report to the Court upon the following matters, viz. :—(1) Whether the directors of the society in any year exceeded their borrowing powers; (2) whether the directors in granting loans observed the rules of the society and had proper valuations made; (3) whether the directors kept proper books of account; (4) whether there were any and what frauds and defalcations of the society's affairs on the part of John Hassen, the former secretary of the society; and (5) whether the non-discovery (if any) of such frauds and defalcations by the

directors and auditors of the society was due to defective book-keeping, or how otherwise, and on all such matters as the liquidators might consider necessary.

The liquidators having made a report, and a supplementary report in accordance with the order of the 16th of June, 1910, these reports came before Mr. Robert Doyle, K.C., the Deputy Recorder of Derry, on the 22nd of September, 1910, for further consideration, when the Deputy Recorder postponed the further consideration of the reports to the next Sessions. The reports came again before him upon the 18th of October, 1910, and upon the further consideration of the reports upon that date the Deputy Recorder made an order directing the liquidators to submit a case for the advice of senior counsel as to whether any proceedings should be taken, and if so, against whom, in respect of the following matters:—(1) An advance of £1500 to John Hassen in respect of premises alleged to have been already mortgaged to the Belfast Bank; (2) a further advance of £2400 to the said John Hassen in respect of which, as alleged, no mortgage was executed; (3) the liability of the directors and officers of the society in respect of the several matters appearing in the said reports of the liquidators and auditors; (4) what proceedings (if any) the liquidators should take against the directors and officers of the society; and (5) all subjects and matters upon which they require assistance and advice, and the liquidators were directed, at the next Equity Sessions, to lay before the Court such case, and the opinion thereon, for further directions.

The liquidators, in accordance with this order, having submitted a case to senior counsel and obtained an opinion thereon, on the 30th of December, 1910, served a notice of motion of their intention to apply to the Recorder of Derry on the 9th of January, 1911, for directions to institute proceedings advised by senior counsel, and also caused subpœnas to be served upon James McClean and Samuel W. Kennedy (two of the prosecutors), directors of the society, to give evidence on behalf of the liquidators "on the hearing of an application by them for directions to institute certain proceedings advised by counsel." When the motion came on for hearing before the relator on the 9th of January, 1911, counsel for the liquidators applied to the

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Court to appoint a day for the examination of the witnesses so summoned and to be summoned, and to have the notice of motion amended by grounding the same on the oral evidence of the several parties subpœnaed. The relator, having granted liberty to amend the notice of motion in accordance with the application of counsel for the liquidators, fixed the 11th of January, 1911, for the hearing of the motion and the examination of the witnesses. The prosecutor, John H. Pollock, having been subpœnaed after the application of the 9th of January, 1911, on the 11th of January, 1911, when the motion came before the relator for hearing, counsel on behalf of the three prosecutors objected to the directors of the society being examined, upon the following grounds :—(1) That the jurisdiction given to the Judges of the High Court of Justice in Ireland in the winding up of limited companies under the Companies Acts to summon directors and other officers of the company being wound up to be examined as to their acts and defaults was not, in this case, conferred on the Recorder, as a Building Society in Ireland was not, and could not be, wound up under the provisions of the Companies Acts that apply to Ireland ; and (2) that the examination of the directors was for the purpose of procuring evidence to be used against them on the hearing of the Chancery action in the High Court about to be instituted against them by the liquidators, and that the Recorder had no jurisdiction to allow any such examination before him of the directors for any such purpose, the Recorder himself not having any jurisdiction to entertain any application to make the directors liable for their alleged defaults. Counsel for the prosecutors also informed the relator that the prosecutors would apply to the High Court for a writ of prohibition. Upon hearing the objections of counsel for the prosecutors, and of the intention to apply for a writ of prohibition, the Recorder adjourned the hearing of the motion to the next Sessions pending the hearing of the application for the writ of prohibition.

On the 23rd of January, 1911, a conditional order for the writ of prohibition was obtained, upon two affidavits of Mr. James A. Elliott, solicitor for the prosecutors, on the following grounds :—

"(1) That the Companies Acts, 1862 to 1908, and the powers conferred thereby to examine directors during the course of the winding-up proceedings, do not apply to the winding up of the said Building Society.

"(2) That the Recorder of Londonderry has no power under his jurisdiction for winding up Building Societies, to entertain before him an examination of the directors of the said Building Society, for the purpose of obtaining from them admissions as to alleged acts of default to be used as evidence against the directors on the hearing of an action against them in the High Court of Justice for Ireland, about to be brought by the liquidators at the direction of the Recorder.

"(3) That the said Recorder has no jurisdiction to examine the said directors for any purpose other than the winding up of the said Building Society.

"(4) That the said proposed examination is not within the jurisdiction of the Recorder."

An affidavit showing cause against the conditional order being made absolute was sworn by his Honour Thomas George Overend, Recorder of Londonderry, from which the following are the extracts material to this report:—

"I assumed it to be settled law that the 32nd section of the Building Societies Act, 1874, though it does not mention or incorporate the Companies Acts, points to them so directly that a Building Society ought to be wound up in a manner analogous to a Company, and that rules might be made to wind them up as if such Societies were Companies under the Companies Acts. I was aware that the English rule-making authority of the County Courts had adopted this view before the Act of 1894 was passed, which makes such a Society in England and Wales a Company for the purpose of winding up under the English Winding Up Act of 1890. The English Order of 1889-1890 expressly enacted that both the provisions of the Companies Acts and the rules made thereunder should apply to the winding up of Building Societies under the Act of 1874, in all respects as if the Societies were Companies under the Companies Acts.

"It appeared to me that the Irish supplemental order of

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22nd November, 1890, and Order XXXVI., Rule 22, of the County Court Orders of 1890, though not quite the same as the English Order, made the enactments and practice of the Chancery Division in Ireland applying to the winding up of Companies extend to a Building Society in Ireland to the extent expressed in the order.

"I was pressed by counsel for the directors to reject this Order as mere nonsense, that the Chancery Division in Ireland, having no jurisdiction over Building Societies, could have no enactments or practice relating to them—but I rejected this view, and, seeing the resemblance to the English Order, even in the matter of costs, I felt that the true meaning of the Irish Order was to apply the enactments and practice of the Chancery Division in the winding up of a Company to this Building Society. However, I thought it might be doubtful if section 174 of the Companies (Consolidation) Act, 1908, would apply, and, as I did not need it on this application, I proceeded under jurisdiction that I thought was undoubted. I claimed that the directors and every other officer of the Society, past and present, could be called as a witness on any proper application of the liquidators, and asked any relevant and lawful question as to the matter before me, and, if he objected to the question on any ground, I should rule on the question, whether it was admissible or not, and that, before sanctioning actions, it was vital to know the directors who should be omitted, and the causes of action alleged in the cases of the others whom the liquidators desired to sue."

An affidavit showing cause was also sworn by the liquidators; and these two affidavits, with the affidavits of Mr. Elliott grounding the motion for the conditional order and in reply to the affidavits showing cause, and the various documents referred to and exhibited by these several affidavits, formed the evidence before the Court of King's Bench upon the argument.

The following is the text of the County Court Orders and rules referred to in the affidavit of the relator and by counsel in argument:—

"COUNTY COURTS (IRELAND) ORDERS, 1890."

"Order XXXVI., Rule 22.

"Subject to the foregoing rules and orders, the enactments and practice relating to ordinary civil bill proceedings shall, so far

as the same are applicable, apply to every proceeding under the equitable jurisdiction of the Civil Bill Court, save a lunacy proceeding; and when such enactments and practice are not applicable to such proceedings, the enactments and practice relating to the Chancery Division of the High Court of Justice in Ireland shall be followed in such proceedings so far as the same are applicable, *mutatis mutandis*."

"Supplemental General Order, 29th November, 1890.

"To remove all doubts, it is hereby ordered that Rule 22 of Order XXXVI. of the County Courts (Ireland) Orders, 1890, shall apply to all proceedings under the Building Societies Acts, 1874, 1875, 1877, and 1884, or any of them, and that the costs of such proceedings shall be one-half of the lower scale of costs applicable to such proceedings in the Chancery Division of the High Court."

Denis Henry, K.C., and *A. Babington* (with them *F. Osborne*), for the prosecutors:—

The Building Societies Act of 1874 (1) gave jurisdiction to wind up Building Societies to the Civil Bill Court. As the law stood in 1874, the only jurisdiction to examine witnesses given to that Court was that conferred by section 101 of the Civil Bill Act of 1851 (2). In England the position was a little different. There the County Courts had a jurisdiction, not original, but in substitution, in cases sent from the Supreme Court under the Companies Acts. That jurisdiction was never given in Ireland. The Recorder has here issued the summonses, and professed to proceed under the Companies Acts. The summons issued to the prosecutors was headed "In the Matter of the Companies Act, 1908." The section which confers jurisdiction upon the Recorder to wind up the society is section 32 of the Building Societies Act, 1874 (1), and section 4 of that Act, which defines the "Court." Under section 32 provision is made for making General Orders regulating the procedure of the Court, and the jurisdiction of the Civil Bill Court is merely extended to the winding up of Building Societies. The question is, Do that section and the General Orders thereunder bring in the Companies Acts?

(1) 37 & 38 Vict. c. 42. (2) 14 & 15 Vict. c. 57.

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Under section 8 of the Building Societies Act of 1894 (1) reference is made to the Companies Winding Up Act of 1890 (2), but that Act never applied to Ireland. The Act of 1890, by section 33, first gave original jurisdiction to the County Court in England.

The only jurisdiction of the Recorder is that conferred by section 32 of the Act of 1874 (3), the rules made thereunder, and the Acts regulating County Courts in Ireland.

From 1874 to 1890 no rules were made under section 32 of the Building Societies Act of 1874 (3). In the year 1890 the County Court Judges made a rule, *i.e.*, Rule 22 of the County Courts (Ireland) Orders, Order XXXVI. (4), which provided that the procedure in the case of ordinary civil bills should apply to proceedings under the equitable jurisdiction of the Civil Bill Court; and where that procedure was not applicable, the enactments and procedure of the Chancery Division of the High Court shauld be followed. That rule did not refer to building societies, and to remove doubts as to its application to these societies, a Supplemental Rule was made on the 29th November, 1890, which applied, *simpliciter*, Rule 22 to the winding up of building societies, and provided that the costs of winding-up proceedings should be one-half of the lower scale of costs in the High Court (5). The Recorder appears to have considered that this let loose all winding-up procedure under the Companies Acts; but what appears to have been done in framing the Supplemental Rule was the copying of a similar English rule, without regard to the context of the English rule or the jurisdiction of the English County Court.

If Rule 22 and the Supplemental Rule had been made in the year 1874 or 1875, there would then have been no equity jurisdiction of the Civil Bill Court to which they could apply. The second branch of Rule 22 must be construed with respect to the winding up of a building society as a rule applicable between 1874 and 1877. The only power to make rules with reference to

(1) 57 & 58 Vict. c. 47.
(2) 53 & 54 Vict. c. 63.
(3) 37 & 38 Vict. c. 42.
(4) Carleton, p. 1207; Babington, p. 393.
(5) Babington, p. 394.

building societies is that given by sub-section 4 of section 32 of the Building Societies Act, 1874 (1). That refers purely to procedure; it does not deal with jurisdiction. No General Order could apply a code, which did not otherwise apply, to proceedings before the Civil Bill Court. Certainly it could not apply the "Extraordinary Powers of the Court," which it has been sought to exercise in this case, under section 174 of the Companies (Consolidation) Act, 1908 (2). In fact, the rules have not applied the Companies Code. They have provided that where the ordinary enactments and procedure of the Civil Bill Court are not applicable to proceedings under the equity jurisdiction of the Civil Bill Court, the enactments and practice of the Chancery Division of the High Court shall apply. Unless it is suggested that the ordinary practice and enactments are not applicable, the Court cannot seek to apply the Chancery procedure. How is it possible to spell out of this provision the application of the Companies Code? If the learned Recorder had jurisdiction to himself try the question of malfeasance by the directors, he could examine the directors; but he has not jurisdiction to try that question. He never claimed such jurisdiction. The examination he desired to enter upon was for the purpose of founding proceedings against the directors in the High Court. Its real object was to save the costs of a dismissal of these proceedings. The limit of the learned Recorder's power to examine witnesses is provided by section 101 of the Civil Bill Act of 1851 (3), and he can only examine witnesses for the purpose of determining a dispute before him.

W. M. Jellett, K.C., and *Leech, K.C.* (with them *Chadwick*), for the defendant:—

The Companies (Consolidation) Act of 1908 (2) re-enacts the provisions of the Companies Code. Certain of the sections of the consolidating Act specially mention England. It is a necessary construction of that Act that, where no special reference is made in a section to England, such section is of general application.

(1) 37 & 38 Vict. c. 42.
(2) 8 Edw. 7, c. 69.
(3) 14 & 15 Vict. c. 57.

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Section 174 of the Act of 1908 (1), which gives power to examine directors with reference to the affairs of a company, in respect of which the Court has made a winding-up order, is such a general section, and the "Court," as defined, means the Court having jurisdiction to wind up (section 285) (1). If we can satisfy the Court that the Companies Acts apply to the winding up of building societies, the Court mentioned in section 174 of the Companies (Consolidation) Act, 1908 (1), would mean the County Court, and that Court would have the jurisdiction, conferred by that section, to enter upon the examination of the directors of the building society, which it has been sought in this case to hold.

The main point—Do the Companies Acts apply at all to the winding up of building societies?—has been the subject of decision by the Court of King's Bench in England. In *Jones* v. *Swansea Cambrian Benefit Building Society* (2), decided upon section 115 of the Companies Act, 1862 (3), it was, in effect, decided that, notwithstanding no special reference to, or incorporation of, the Companies Acts by the Building Societies Act, 1874 (4), the procedure under the Companies Act of 1862 (3) applied to the winding up of a building society. This case was followed in *Andrew* v. *Swansea Cambrian Benefit Building Society* (5), and the decision in *In re Sunderland Thirty-second Universal Building Society* (6). The decision in *In re Portsea Island Building Society* (7) carries us the whole way on this branch of the argument. It was held in *In re the Ferndale Industrial Co-operative Society* (8) that section 10 of the Companies (Winding Up) Act of 1890 (9) applied to the winding up of a building society. That section has been replaced by section 215 of the Companies (Consolidation) Act, 1908 (1), which is a general section, and which also repeals and re-enacts section 165 of the Companies Act, 1862 (3). The learned Recorder, under section 215, would have had power himself to decide the question of misfeasance by the directors.

(1) 8 Edw. 7, c. 69.
(2) 29 W. R. 382.
(3) 25 & 26 Vict. c. 89.
(4) 37 & 38 Vict. c. 42.
(5) 50 L. J. (N. S.) C. P. 428.
(6) 21 Q. B. D. 349.
(7) [1893] 3 Ch. 205.
(8) [1894] 1 Q. B. 828.
(9) 53 & 54 Vict. c. 63.

What would be the position of the learned Recorder if the Companies Acts did not apply? The mouths of the directors and officers of the society would be closed. They are the only persons who are in a position to thoroughly know the affairs of the society; and, consequently, the Recorder would have to wind up the society in ignorance of its affairs. It is impossible to assume that such was the intention of the Legislature.

It is not a ground for issuing a writ of prohibition that the Court which it is sought to affect thereby, although it has jurisdiction to deal with the matter which is the subject of the writ, may possibly exceed that jurisdiction: *Hallack* v. *University of Cambridge* (1); *R.* v. *Twiss* (2); *Skipton Industrial Co-operative Society* v. *Prince* (3).

Osborne, in reply:—

Jones v. *Swansea Cambrian Benefit Building Society* (4) was decided upon the ground that, in England, a rule which expressly referred to the Companies Acts had been made with reference to the winding up of building societies by the County Court. The ground of that decision was that this rule would be unworkable if the code to which it referred was not incorporated. The English rule referred to is given in Appendix G of Heywood's County Court Practice (1886), at page 640, and is as follows:—"Order XLII., County Court Rules, 1886.—The General Orders, rules, and forms in the Chancery Division of the High Court of Justice regulating the mode of proceeding under the Companies Acts, 1862 and 1867, shall be the orders, rules, and forms in all proceedings in the County Courts for the winding up of a society registered under the Building Societies Act, 1874 (5), . . . so far as the same are applicable."

Even if the Companies Acts do apply to the winding up by the County Court of a building society, there are still two objections to the course which the learned Recorder seeks to follow in this case. The jurisdiction he seeks to exercise is not the ordinary jurisdiction exercised by the Court in the winding up

(1) 1 Q. B. 593.
(2) L. R. 4 Q. B. 407, 413.
(3) 33 L. J. (N. S.) Q. B. 323.
(4) 29 W. R. 382.
(5) 37 & 38 Vict. c. 42.

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of companies. It is the "extraordinary powers of the Court" conferred by section 174 of the Companies (Consolidation) Act, 1908 (1). Even if section 174 of the Companies (Consolidation) Act, 1908 (1), does apply, and can be availed of by the learned Recorder, what he has here sought to do is not that which that section authorizes. That section provides for the examination of directors or officers for the purpose of determining liabilities, and awarding penalties therefor. What the learned Recorder here seeks to do is to examine the directors for the purpose of ascertaining whether proceedings should be instituted to determine liabilities before another tribunal, viz., the Chancery Division of the High Court.

April 25.

PALLES, C.B. :—

The question for decision is whether a Recorder or County Court Judge, who, under the Building Societies Act, 1874 (2), has ordered a building society to be wound up, has jurisdiction, in the course of the proceedings under that order, to require directors of the society to submit to be examined before him, with a view to his determining whether there is such a *prima facie* case against them, or some of them, of being guilty of misfeasance or breach of trust as such directors as would induce him to direct the liquidators of the society to proceed against them, by action in the High Court, to make them responsible to the society for the loss to it thereby sustained.

I am of opinion that he has this jurisdiction, under the Building Societies Act, 1874 (2).

By the 32nd section of this Act—which applies to this country as well as to England—it is enacted that a society registered under it may terminate or be dissolved, *inter alia*, "(4) By winding up, either voluntarily under the supervision of the Court, or by the Court, if the Court shall so order, on the petition of any member authorized by three-fourths of the members present at a general meeting specially called for the purpose, to present the same on behalf of the society, or on the petition of a judgment creditor for not less than £50, but not otherwise."

(1) 8 Edw. 7, c. 69. (2) 37 & 38 Vict. c. 42.

General Orders regulating the proceedings of the Court under this section may be, from time to time, made by the authority for the time being empowered to make General Orders for the Court. The "Court" in the Act is defined, by section 4, to mean, in Ireland, "the Civil Bill Court within the jurisdiction of which" the office or place of meeting for the business of the society is situate.

I need not say that those General Orders cannot extend "jurisdiction." The jurisdiction must depend upon the statute; the procedure for prescribing the mode in which that jurisdiction shall be exercised is to be prescribed by General Orders.

What, then, is the jurisdiction conferred by the statute on the Civil Bill Court of Londonderry presided over by the learned Recorder? The jurisdiction includes the winding up of the society by the Court. The statutable grant of this jurisdiction carries with it everything necessarily incident to dissolving the society, to ascertaining its assets, to calling them in and making them available for distribution, and to distributing them amongst the persons rightfully entitled thereto. This winding up of a society, under this Act, or incorporated by statute, can be effected only in some mode prescribed by statute. There could not at common law be any winding up of a society incorporated by statute. It seems, clear, therefore, that some statutable mode of winding up by a Court of a society, so incorporated, must have been known to the Legislature when the Act of 1874 was passed, and that the jurisdiction incident to such mode of winding up was that conferred upon the Civil Bill Court. A difficulty might have arisen, had more than one mode of winding up such a society been known to the Legislature, the jurisdiction in each being different, as there is nothing in the Act to indicate which of these modes (if they existed) was impliedly incorporated. But such a state of the law as would give rise to that difficulty did not, in fact, exist. There was, in 1874, but one mode of winding up a statutably incorporated society, viz., that prescribed by the Companies Act, 1862 (1); an Act, some of the sections of which, as pointed out by Lord Lindley in *Andrew* v. *Swansea Cambrian Benefit Building Society* (2), are wide enough to embrace a society incorporated by this Act.

(1) 25 & 26 Vict. c. 89.

(2) 50 L. J. (N. S.) C. P. 428.

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It follows, in my opinion, conclusively, that the winding-up provisions of this Act of 1862 (1), so far as they confer jurisdiction upon the Court charged with the winding up, are impliedly incorporated in the Act of 1874 (2), and that sections 115 and 165 of that Act (1) confer upon the Recorder the jurisdiction to do that which he stated he would do, and against doing which it is now sought to prohibit him. Although this Act (1) has been repealed by the Companies (Consolidation) Act, 1908 (3), the implied reference to these sections in the Act of 1862 (1) must, under the Act of 1908 (3), be taken as a reference to the corresponding sections of the 1908 Act (3), viz., sections 174 and 215.

But the English decisions go much further. In applying them I, of course, have regard to the difference between the statute law in force in that country and in Ireland; but two of them, viz., *Andrew* v. *Swansea Cambrian Benefit Building Society* (4), decided by Denman and Lindley, JJ., and *In re Sunderland Thirty-second Universal Building Society* (5), decided by Field and Wills, JJ., arose upon the Companies Act, 1862 (1), and the Building Societies Act, 1874 (2), Acts common to both countries; and the other two: *The Portsea Island Case* (6), decided by Lord Justice Vaughan-Williams, and the judgments of Mathew and Cave, JJ., in *In re Ferndale Industrial Co-operative Society* (7), are valuable, as approving of the decision in the *Swansea Case* (4).

Upon the whole, without analyzing each particular case, it may be taken that seven Judges, viz., Lord Lindley, Lord Field, Lords Justices Vaughan-Williams and Mathew, and Justices Cave and Wills, are of opinion that the true effect of section 32 of the Building Societies Act, 1874 (2) (which is the Act now before us), is impliedly to incorporate with itself all the winding-up clauses of the Companies Act of 1862 (1).

If this be—as it plainly is—undoubted law in England, so must it also be law in this country, and, consequently, the sections of the Companies (Consolidation) Act, 1908 (3), which are by

(1) 25 & 26 Vict. c. 89.
(2) 37 & 38 Vict. c. 42.
(3) 8 Edw. 7, c. 69.
(4) 50 L. J. (N. S.) C. P. 428.
(5) 21 Q. B. D. 349.
(6) [1893] 3 Ch. 205.
(7) [1894] 1 Q. B., at p. 831.

that Act substituted for those clauses of the now repealed Companies Act of 1862 (1), must apply to the winding up of this Society, now pending, before the learned Recorder. The cause shown must be allowed, with costs.

KENNY, J. :—

In the course of the discussion before us it has been admitted, on behalf of the prosecutors, (1) that the Building Societies Act of 1874 (2) confers on the County Court power to wind up a Building Society ; and (2) that, if we held that the County Court had power, in the course of the winding up, to make an order based on misfeasance or breach of trust, pursuant to the 215th section of the Companies (Consolidation) Act of 1908 (3), it would follow that the Recorder had jurisdiction to enter on the examination which is sought to be prohibited by the order of this Court.

These admissions were unavoidable. The 32nd section of the Building Societies Act of 1874 (2) provides, in express terms, for a winding up by the "Court," and by the 4th section, it is declared that the "Court" means the "County Court." The jurisdiction in the latter Court to "wind up,"—however it is to be worked out—undoubtedly exists, unless the words conferring it can be treated as nugatory or struck out of the statute. This it would be impossible to do, so we must take it that there is a statutory power to wind up, and that that power is to be exercised by the County Court.

But it was contended that the power so conferred was merely a power to realize and distribute the assets of the society, and that the extraordinary jurisdiction given by the 215th section of the Act of 1908 (3) (analogous to the 165th section of the Companies Act of 1862 (1)) could not be invoked. But, once it is clear that a winding up can proceed in the County Court, within what limits is the jurisdiction to be confined, and what is its character? No General Orders, pursuant to the 32nd section of the Act of 1874 (2), were made till 1890, when, for the first time, it was *expressly*

(1) 25 & 26 Vict. c. 89.
(2) 37 & 38 Vict. c. 42.
(3) 8 Edw. 7, c. 69.

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provided that the enactments and practice of the Chancery Division of the High Court should be followed in the winding up of Building Societies. What was the position of those companies in the intervening years from 1874 to 1890? The question is answered by the *Swansea Case* (1) in 1880, and the *Portsea Island Case* (2) in 1893, which I adopt as unquestioned authorities. In the former case it was decided that the practice under the Companies Acts applied in the County Court, and in the latter Vaughan-Williams, L.J., assuming that decision to be correct, examined the grounds on which it had proceeded, and held that, if it were correct, the provisions in force at any particular time for the winding up of companies in the Chancery Division of the High Court would apply to the winding up of a Building Society in the County Court, even though such provisions might be the result of enactments passed *since* 1874, inasmuch as the only effect of the latter Act was to substitute the County Court instead of the High Court for winding-up purposes (3). The result of that decision is that the existing procedure in the Chancery Division, whether derived under the existing Companies Acts and Orders, or under its own statutory or inherent authority, is applicable to a winding up in the County Court. I am, therefore, of opinion that the 215th section of the Companies (Consolidation) Act of 1908 (4) could be availed of in the County Court, and that, in aid of the powers conferred by that section, parties could be summoned for examination pursuant to section 174 of the same statute.

Having regard to this view, it becomes unnecessary to consider either the nature or extent of the power to examine witnesses conferred by the Civil Bill Act (5), or the interpretation and effect of the Supplemental County Court Rule of 1890 (6) purporting to be made under the Act of 1874 (7).

(1) 50 L. J. (N. S.) C. P. 428.
(2) [1893] 3 Ch. 205.
(3) [1893] 3 Ch., at p. 209.
(4) 8 Edw. 7, c. 69.
(5) 14 & 15 Vict. c. 57.
(6) Babington, County Court Practice, at p. 394.
(7) 37 & 38 Vict. c. 42.

WRIGHT, J.:—

I shall add but a few words, as I concur with the judgment of the other members of the Court.

I must confess that during the earlier part of the argument the question for decision seemed to me to be by no means free from doubt and difficulty; but, as the argument proceeded, my doubts on the matter were removed. The Act of 1874 (1) is an Imperial Act, and applies to England, Ireland, and Scotland. It enacts that a building society shall be wound up nowhere else than in a Civil Bill Court. The Act has been considered in several English decisions, in *Andrew* v. *Swansea Cambrian Benefit Building Society* (2) in 1880, and next, in *In re Sunderland Thirty-second Universal Building Society* (3) in 1888, both of which cases were decisions on the construction of the Act of 1874 (1), and prior to the Companies (Winding Up) Act of 1890 (4), which applied to England alone, and both were decisions on what, as I have said before, is an Imperial Act. Both these cases have been followed since they were decided. I think it necessary only to refer to the *Portsea Island Case* (5), where Lord Justice Vaughan Williams, at page 209 of the Report, cites the judgment of Lord Lindley in *The Swansea Case*. [His Lordship read the passage referred to and continued]—*The Portsea Island Case* (5) was decided after the Act of 1890 (4) had been passed; but it is to the same effect, and proceeds upon the same principle as is laid down by the earlier cases. It is clear, accordingly, that it was the law in England, prior to the Act of 1890 (4), that sections 115 and 165 of the Companies Act of 1862 (6) applied to the winding up of a society in the Civil Bill Court, or, as it would be in England, the County Court.

What is the effect of the Companies (Consolidation) Act of 1908 (7)? That Act repealed the whole of the old Companies Acts; for section 115 of the Act of 1862 (7) it substituted section 174, the section referred to by the Recorder, and

(1) 37 & 38 Vict. c. 42.
(2) 50 L. J. (N. S.) C. P. 428.
(3) 21 Q. B. D. 349.
(4) 53 & 54 Vict. c. 63.
(5) [1893] 3 Ch. 205.
(6) 25 & 26 Vict. c. 89
(7) 8 Edw. 7, c. 69.

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section 165 of the old Act (1) was repealed and replaced by section 215 of the Act of 1908 (2).

I am clearly of opinion that, notwithstanding that for so many years no rules were made under the Act, the principle of the English cases to which I have referred applies to this Imperial statute, and that the procedure under the Companies Acts applies to the winding up of a society in the Civil Bill Court.

I entirely dissent from the argument of Mr. Henry that the learned Recorder, in this matter of the winding up, has his powers as to hearing witnesses at all confined to the powers given to him under section 151 of the old Civil Bill Act of 1851 (3).

For the reasons which I have shortly stated I concur with my Lord Chief Baron and my brother Kenny in holding that the cause shown must be allowed.

Solicitors for the prosecutors: *Wilson & Elliott.*

Solicitor for the liquidator: *Henry S. Robinson.*

C. N. K.

(1) 25 & 26 Vict. c. 89. (2) 8 Edw. 7, c. 69. (3) 14 & 15 Vict. c. 57.

THE KING (AT THE PROSECUTION OF PATRICK J. O'NEILL, CAPTAIN C. C. VESEY, JOSEPH MOONEY, JOSEPH O'NEILL, A. K. O'FARRELL, ARCHDALE GRAHAM, JAMES COLLINS, AND PATRICK BAGGOTT) *v.* R. J. NEWELL, AUDITOR OF THE LOCAL GOVERNMENT BOARD (1).

K. B. Div. 1910. Nov. 15.

Local Government—"Public Roads"—Evidence—Surcharge—61 & 62 *Vict. c.* 37, *sect.* 82; 7 & 8 *Vict. c.* 106, *sect.* 55.

Where there is no evidence of public user or of any presentment having ever been made in respect of a road, and where there is clear evidence of non-user in modern times, such road is not a "public road," the expense of repairing and maintaining which a County Council can lawfully provide for and charge upon the rates as a public work.

The onus of showing statutable authority for payments made by a public body lies on the body making such payments.

MOTION to make absolute a conditional order for *certiorari* to quash certain disallowances and surcharges made by the Local Government Board Auditor.

Affidavits grounding the application for the conditional order were made by William J. Shannon, solicitor for the Dublin County Council, and by William Collen, County Surveyor for the County Dublin, in which the facts were set out as follows:—The Local Government Auditor, Mr. R. J. Newell, when auditing the accounts for the County Dublin County Council, for the half-year ending the 30th September, 1909, made certain disallowances, and struck out of the account, as illegal, certain payments made by the County Council for the maintenance and repair of certain roads, and surcharged the same against the particular members of the County Council who had signed the respective paying orders for the same. The members of the County Council who were surcharged by the said disallowances and surcharges were

(1) Before PALLES, C.B., and GIBSON and BOYD, JJ.

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Mr. Patrick J. O'Neill (Chairman), Captain C. C. Vesey, and Messrs. Joseph Mooney, Joseph O'Neill, A. K. O'Farrell, Archdale Graham, James Collins, and Patrick Baggott. The auditor gave as his reasons for making the said disallowances and surcharges :— "My reasons for all the foregoing disallowances and surcharges are, that the road in respect of which the expense was incurred in each case was not a public road." The paying orders referred to in the afore-mentioned surcharges were all made in respect of two roads which were taken over and repaired pursuant to two resolutions passed at the Quarterly Meeting of the Balrothery Rural District Council, held on the 27th January, 1909, which resolutions were subsequently approved by the Dublin County Council, on the 18th of March, 1909. The first road, to the expenditure in maintenance of which the auditor objected, was a road described as leading from Ballyboghill to Oldtown, passing the house of Mr. M'Dermott, Westphalstown; and the other road was described as leading from Swords to Boscall Road, at Magillstown. The proposal in respect of each of these two roads had been duly passed by the Balrothery Rural District Council, after notice of motion by the members within whose district the said roads were situate, and the said resolutions authorizing the sums expended in maintenance and repair of the said roads were subsequently approved by the County Council at their Quarterly Meeting; this County Council Quarterly Meeting was a public one, at which any ratepayer could, if he had so desired, have objected to the expenditure on such roads being passed. No such objection was at that time or any other time made by any such ratepayer. The County Surveyor in his affidavit explained that the first road was a lane, with a metalled surface over 16 feet wide, extending from the main public road for about 110 perches, passing Mr. M'Dermott's house and ending at a gate that leads into one of his fields; from this gate a track ran across Mr. M'Dermott's field, which was a right-of-way used every day by about thirty persons, including children going to school and people going to chapel, and cut off about half a mile for people on foot going from Ballyboghill to Oldtown; the lane was also used by a farmer named Keogh, whose land lay along the east side and had five gates opening on to the lane, as well as by another

farmer who had land at the end; prior to being taken over, about twenty perches—the distance between the main road and his house—had been well kept by Mr. M'Dermott. The County Surveyor also stated that the second road, although described as a lane, was apparently a portion of a road laid out many years ago to connect the main road between Swords and Boscall with the main road from Ballyboghill to Corduff; this projected road had never been completed, but the portion taken over had always been well kept, and had originally been properly laid down and made with stones; this formed the southern portion of the old projected road commencing at the main road leading from Swords to Boscall; the remaining or northern portion of the old road was still quite distinct, though overgrown with bushes and brambles; it contained no gates or other obstructions, and at two places where it crosses the Ballyboghill river, it contained two substantial stone culverts, which had manifestly been built when the road was contemplated. The portion taken over by the Council, besides being used by certain of the tenants on the Cantwell estate, formed the only means of approach to the houses of three tenants to whom land lying along the lane had been given by the Estates Commissioners, and was also the only approach to a labourer's cottage recently erected by the Balrothery Rural District Council. Robert J. Newell, Esq., the Local Government Board Auditor, in an affidavit by way of cause against the conditional order, stated that the County Surveyor in reply to his inquiries had informed him that neither of the roads in question had been made, or at any time repaired, at the expense of the county, and no presentment for repair thereof had ever been made. He also ascertained that neither of the said roads connected existing public roads, each ending in land belonging to private individuals. The auditor also said he believed no dedication of either of the said roads had ever been made to the public, and that in these circumstances he was of opinion that neither of the roads in question was a public road, and that the repair thereof was not a public work such as the County Council might legally contract for, so as to make the expense thereof a legal charge upon the rates.

The members of the council who had been surcharged obtained

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a conditional order for *certiorari* to remove into the King's Bench for the purpose of being quashed the said orders of disallowance and certificates of surcharge, on the following grounds:—(1) that said orders of disallowance and certificates of surcharge were made without, and in excess of, legal authority; (2) that the payments so disallowed and surcharged by the said orders and certificates were neither contrary to law nor unfounded; (3) that the payments so disallowed and surcharged by the said orders and certificates were payments made *bona fide* in discharge of debts legally due by the County Council of the County of Dublin, to third parties, and incurred in pursuance of a resolution of the said council dated the 18th March, 1909, and that the auditor had no jurisdiction to disallow and surcharge the payments so made, as contrary to law and unfounded; (4) that the payments so disallowed and surcharged by the said orders and certificates were payments of sums necessary for improving and repairing parts of certain public roads in the county of Dublin, and said payments were made in pursuance of a resolution of the County Council of the County of Dublin, dated the 18th March, 1909, passed by the said council in exercise of the power in that behalf conferred upon them by 61 & 62 Vict. c. 37, s. 82, and 7 & 8 Vict. c. 106, s. 55, as adapted by the Adaptation of Enactments Order of 30th January, 1899; and that the auditor had no jurisdiction to disallow and surcharge the payments so made, as contrary to law and unfounded.

Ronan, K.C. (with him, *Timothy Sullivan*), moved on behalf of the appellants to make absolute the conditional order:—

There is strong evidence from which it may be inferred that these roads were laid down at the public expense; the materials used in their construction, their width, the absence of gate or obstruction across either of them at any point, the culverts over the river in one of them, and in particular, the fact that in both cases they join two main public roads, show they were public roads; "once a highway, always a highway" applies, and the fact that only a portion of each has been in use recently does not alter their character; in addition these roads are of great benefit to the general public, and are indeed the only way of access to

a large number of houses; the council in paying for repairs to these roads were therefore acting within the powers conferred upon them by 61 & 62 Vict. c. 37, s. 82, and 7 & 8 Vict. c. 106, s. 55, as adapted by the Adaptation of Enactments Order of 30th January, 1899.

D. S. Henry, K.C. (with whom were *Powell, K.C.*, and *T. Henry Maxwell*), contra:—

There is not a vestige of evidence of any presentment ever having been made by the Grand Jury for either of these roads, or of the dedication of either of them to the public.

PALLES, C.B.:—

The *onus* lies upon the persons who have made a payment, for which credit is sought in an account under audit, to show a statutable authority for making that payment. The statute here relied on shows that authority, but subject to the condition that the roads are public roads. Therefore it lies on the persons surcharged here to show that these roads are public roads. There seems to me to be no pretence for saying that there ever was a presentment in respect of either of these roads; nor is there evidence of public user of them at any time; and there is clear evidence of non-user during modern times. Under these circumstances, I do not think that there is any evidence of either of them ever having become a public road; and therefore, we must affirm the decision of the auditor. If, however, there has been any misapprehension on the part of these gentlemen as to the nature of these roads, they can of course go to the Local Government Board: which, as is well known, has a jurisdiction different from ours. They can consider the question of remitting the amount.

GIBSON and BOYD, JJ., concurred.

Solicitor for the appellants: *W. J. Shannon.*
Solicitors for respondents: *Allen and Halpin.*

J. M.

H. L.
1911.
May 12.

MURPHY *v.* THE KING.

Old Age Pension—Decision of local pension committee—Statutory conditions—"Final and conclusive"—Old Age Pensions Act, 1908, 8 *Edw.* 7, *c.* 40.

Appeal by the suppliant from the judgment of the Court of Appeal (reported *ante*, p. 88).

James O'Connor, K.C., and *Edmond Lupton*, for the appellant.

The Attorney-General for Ireland (*The Right Hon. Redmond Barry, K.C.*), *Ronan, K.C.*, and *Wylie*, for the respondent, were not called on.

The House of Lords (Lords Loreburn, L.C., Ashbourne, Alverstone, C.J., Atkinson, and Shaw of Dunferline) affirmed the judgment of the Court of Appeal, and dismissed the appeal with costs (1).

Solicitor for the appellant: *G. G. Duffy* for *M. J. O'Connor & Co.*

Solicitors for the respondent: *Beveridge, Greig, & Co.*, for *T. T. Mecredy & Son.*

(1) [1911] A. C. 401.

MOORE *v.* BOYD (1).

K. B. Div.
1911.

April 28.
May 12.
June 9.

Valuation—Premises "of a public nature" or "occupied for the public service," and premises "dedicated to or used for public purposes"—Premises marked "exempt" in valuation lists—Liability of person in receipt of rent therefor to pay poor rate on half such rent—Irish Poor Law Act, 1838 (1 & 2 *Vict. c.* 56)—*Poor Law (Ireland) Act*, 1849 (12 & 13 *Vict. c.* 104)—*Irish Valuation Act*, 1852 (15 & 16 *Vict. c.* 63)—*Irish Valuation Amendment Act*, 1854 (17 *Vict. c.* 8)—*Estoppel.*

The decision of the Recorder of Dublin, upon an appeal under the Valuation Acts, 1852 and 1854, that certain hereditaments are used for "public purposes," is a judgment *in rem* as to the nature of the user of such hereditaments, and is "binding and conclusive on all parties to all intents and purposes whatsoever"; and therefore—

The person in receipt of the rent in respect of such hereditaments is liable, under section 10 of the Poor Law Ireland) Act, 1849, "to be rated in respect of such rent to the extent of one-half the poundage" of the rate made for the relief of the poor, and

Such person is estopped by such judgment *in rem* as aforesaid from denying that the hereditaments therein referred to are used for public purposes.

The class of hereditaments exempted by 17 Vict. c. 8, s. 2, as being "of a public nature," or, "occupied for the public service," is co-extensive with that described in 1 & 2 Vict. c. 56, s. 63, as being "dedicated to, or used for public purposes."

Moylan v. *Dublin Port and Docks Board* (2) followed.

CASE STATED by Dodd, J., as follows:—

SPECIAL CASE STATED for the opinion of the King's Bench Division of the High Court of Justice in Ireland by the Honourable Mr. Justice Dodd upon the hearing of a Civil Bill appeal from the Hon. the Recorder of Dublin, in Michaelmas Sittings, 1910.

The plaintiff, who is the poor-rate collector duly appointed by the County Council of the County of Dublin, issued a Civil Bill

(1) Before PALLES, C.B., KENNY and WRIGHT, JJ.
(2) Ir. R. 9 C. L. 457.

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in this matter on the 2nd day of January, 1909, claiming £9 11*s.* 1*d.* for poor rate assessed upon the half rent received by the defendant as immediate lessor out of premises situate at Howth, known as the Quarters of the Harbour Master, up to the 31st March, 1907, and £1 12*s.* 8*d.* poor rate similarly assessed for the financial year ending 31st day of March, 1908, and £1 18*s.* 8*d.* poor rate similarly assessed for the financial year ending the 31st day of March, 1909. I refer to the Civil Bill.

The Civil Bill was heard by the Recorder at Green Street upon the 4th day of July, 1910. He gave a decree for the sum of £1 13*s.* 10*d.*

From this decree the defendant appealed, and the appeal came on upon the 1st day of November, 1910, before me sitting to hear Jury Trials and Civil Bill Appeals for the City of Dublin.

The following facts were stated and admitted by the plaintiff and defendant:—

By lease dated the 29th day of March, 1867, and made between Margaret Helen Boyd of the first part, Alexander Boyd of the second part, and the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland of the third part, a plot of ground situate in the town of Howth was leased to the Commissioners to hold to them and their successors in trust for Her Majesty, her heirs and successors, for the public service, for ninety-nine years, from the 1st day of November, 1865, at the yearly rent of £10 over and above all taxes, &c. The lease contained powers of distress and re-entry, covenants on the part of the lessees to pay rent, to repair, to expend £500 in erecting a dwelling-house upon the demised plot within two years, not to use, without the consent of the lessors, the premises, or any dwelling-house erected thereon, or permit or suffer the same to be used or occupied for any purpose other than as private residences or dwelling-houses, and a covenant on the part of the lessors for quiet enjoyment. The original lease was produced before me, and a copy of it is set out in the schedule hereto. The lessor's interest in the said lease became vested in the defendant in the month of February, 1901. A dwelling-house was erected upon the demised plot in pursuance of the

covenant in the said lease, and was occupied for many years as his residence by the Chief Officer of the Coastguard for the district.

About twenty years ago the Chief Officer of Coastguards was removed by the Admiralty to Kingstown, and the Lords of the Admiralty assigned their interest in the lease to the Commissioners of Public Works, who are the Commissioners of the Howth Harbour, and since that date the house has been used by the Harbour Master of Howth as his residence. The Harbour Master has an office upon the West Pier, distant about a quarter of a mile from his residence, in which he transacts his official duties, but he also uses one room in his residence for official purposes, and the furniture in that room is the property of the Commissioners of Public Works.

The Harbour Master is permitted by the Commissioners to use and occupy the house rent free as part of his salary, but he is not bound by the terms of his appointment as Harbour Master to reside there.

The house is marked "exempt" in the valuation list and rate-book for the County of Dublin, and no valuation is placed against it in the former.

On the 25th January, 1905, the then rate-collector for the district issued a summons against the present defendant, claiming rates upon half the rent payable to the defendant.

This summons came before the magistrate, Mr. Mahony, and was dismissed by him upon the ground that the house was not occupied for public purposes.

The County Council thereupon applied to the Commissioner of Valuation to amend the Valuation List by ceasing to mark the premises as "exempt," but he refused to do so, and the County Council appealed to the Recorder of Dublin, who in the month of December, 1907, confirmed the decision of the Commissioner of Valuation, and dismissed the appeal.

The County Council then issued a summons against the defendant claiming the arrears of rates due to January, 1908, which came before Mr. Mahony, who again dismissed the summons upon the same ground.

No appeal was taken against this dismissal, and no application

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was made to the magistrate to state a case, but the present Civil Bill was issued on the 2nd day of January, 1909.

The Recorder gave a decree for £1 13*s.* 10*d.*, being the amount of the rates which had accrued since the date of the dismissal by Mr. Mahony of the summons which had been brought before him.

Upon the foregoing facts the following questions of law were raised before me :—

1. Whether the defendant is liable to be rated for the relief of the poor under the provisions of the statute 12 & 13 Vict. c. 104, sect. 10, upon half the rent received by him out of the premises comprised in the said lease.

2. Whether, if not so liable, he was estopped from denying liability by the decision of the Recorder upon the appeal against the refusal of the Commissioner of Valuation to amend the Valuation List in which the premises were marked " exempt."

Mr. Clancy, K.C., who appeared for the plaintiff, stated that the decision of these questions would be of very great importance to the County Council, and I acceded to his request, in which Mr. FitzGibbon, who appeared for the defendant, concurred, to state a case in order that they might be decided by a Divisional Court.

I have suspended my decision on the appeal pending the decision of the King's Bench Division on the above questions.

If either of them is answered in the affirmative, there is to be a decree in favour of the plaintiff for the sum of £1 13*s.* 10*d.*, with costs.

If both are answered in the negative, the appeal is to be dismissed with costs.

SCHEDULE.

[The schedule contained a copy of the lease referred to above. The terms of it material to the case are sufficiently set forth in the special case stated.]

The following is a copy of the Civil Bill referred to above :—

COUNTY OF THE CITY OF DUBLIN. To wit.

BY THE RECORDER OF DUBLIN.

PATRICK MOORE, of Portmanna, Clonee, in the County of Dublin, Poor Rate Collector, duly appointed by the County Council of the County of Dublin.

Plaintiff.

WALTER H. BOYD, of 13, Upper Mount Street, in the County of the City of Dublin, B.L.

Defendant.

The Defendant is hereby required personally to appear before me at the SESSIONS' HOUSE, Green Street, in the said City of Dublin, on the 13th day of January, 1909, to answer the Plaintiff's bill for £9 11*s.* 1*d.*, being for Poor Rate duly assessed on the half rent of the premises situate in Howth, and known as the Quarters of the Harbour Master at such place, and payable to the Plaintiff by the Defendant as immediate Lessor of the said premises up to the 31st March, 1907, and for £1 12*s.* 8*d.*, being for Poor Rate duly assessed on the half rent of the said premises, and payable by the Defendant as immediate Lessor for the financial year ending 31st March, 1908, and for £1 18*s.* 2*d.*, being for Poor Rate duly assessed on the half rent of the said premises, and payable by the Defendant as immediate Lessor for the financial year ending 31st March, 1909, and on account stated and settled between Plaintiff and Defendant, which sum Defendant promised to pay, or in default thereof the said Recorder will proceed as to justice shall appertain.

Gerald Fitz Gibbon, K.C., for appellant.

Clancy, K.C. (with whom was *P. A. O'C. White*), for respondent.

The arguments and authorities cited are fully set out in the judgment of the Lord Chief Baron.

PALLES, C.B. :— June 9.

The main question for decision here is whether, in an action for poor rate, against a person in receipt of rent issuing out of a hereditament which has been determined by the Recorder on appeal under the Valuation Acts, 1852 and 1854, to be used for "public purposes," and which, in pursuance of that determination, is distinguished accordingly in the tables of valuation in force under those Acts, the defendant is estopped from denying that the hereditament is so used for public purposes.

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The plaintiff contends that this question has been determined by *Moylan* v. *Dublin Port and Docks Board* (1), a decision of the late Court of Exchequer. That was an action for rates brought against the *occupier* of hereditaments which had been held by the Recorder to be exempt from taxation, as "*occupied for public purposes only*," and which were marked by the Commissioner of Valuation as "exempt." The action was brought upon the allegation that the purposes for which the hereditaments were used were not "public purposes," within the meaning of 17 Vict. c. 8, s. 2, and that consequently the defendants were not entitled to exemption. It was thus sought there to re-try, as it is sought here to re-try, the question of the character of the occupation, which had been already decided by the Recorder. It was held that the question was not open for consideration in the action. The judgment, after referring to 17 Vict. c. 8, s. 2, which enacts that "hereditaments" distinguished as directed by the section, "shall so long as they continue to be of a public nature be deemed exempt," proceeds as follows :—

"The 16th section of the 15 & 16 Vict. c. 63, gives an appeal against the valuations and exemptions in such cases, to the Commissioner, in the first instance, and from him to the Court of Quarter Sessions. By the 23rd section, the determination of the Court of Quarter Sessions upon appeals is made 'conclusive and binding on all parties to all intents and purposes whatsoever.' The decision of the learned Recorder that these tenements are of a public nature was an adjudication made upon a matter within his jurisdiction; and so long as the tenements continue to be distinguished in the lists, which for the time being are the finally revised lists, as being of a public nature, we must hold that it is not competent to the Collector-General to assess them for poor rate, Grand Jury rate, or county cess" (p. 469).

So, too, correlatively, it was held in *Harte* v. *Holmes* (2) that hereditaments not so distinguished were not exempt by reason of the Valuation Acts from taxation.

At the time the Poor Law Act was passed, and from then until the Local Government Act, 1898, a person receiving rent

(1) I. R. 9 C. L. 457. (2) [1898] 2 I. R. 656.

out of a hereditament was liable to half the poor rate on the amount of the rent. The nature of the occupation by reason of which hereditaments were exempted was not intended to benefit the person so receiving the rent; and consequently, by the 10th section of the 12 & 13 Vict. c. 104, after reciting that doubts had arisen whether under the provision in the previous Act persons in receipt of rent arising out of premises occupied for public purposes were liable to pay poor rate upon half the amount of such rent, it was enacted that in every rate to be made for the relief of the poor after the passing of the Act, every person receiving a rent in respect of any such hereditament should be liable to be rated in respect of such rent upon half the valuation. The effect of that was to put the receiver of the rent in the same position as if the hereditament were not held for public purposes, and consequently, unless the law were singularly out of gear, the very fact of the exemption of the occupier, by reason of the occupation being for a public purpose, should carry with it the liability of the rent receiver.

Mr. Fitz Gibbon, however, contends, firstly, that the case of *Moylan* v. *Dublin Port and Docks Board* (1) was wrongly decided. But it is the decision of a Court of co-ordinate jurisdiction with this Court; and if it is to be questioned, it must be so questioned in the Court of Appeal.

Mr. Fitz Gibbon's next contention is that a decision that a hereditament is exempt from taxation under the Valuation Acts is not a decision that it is also exempt under the Poor Law Acts, unless the two classes of exemption are co-extensive; and he relies upon two judgments, which carry with them the utmost respect—the judgments of Mr. Baron Fitz Gerald, and of Chief Justice Monahan, in *The Londonderry Case* (2)—as decisions that the two classes of exemption are not co-extensive.

Now, if the words of Mr. Baron Fitz Gerald, that "there *may be* meanings in which the term 'hereditaments dedicated to public purposes'" (the description of the hereditaments exempted by 1 & 2 Vict. c. 56, s. 63) "will be more extensive than the term 'hereditaments of a public nature,'" at p. 597 (the description of

(1) I. R. 9 C. L. 457. (2) I. R. 2 C. L. 577.

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those exempted by 17 Vict. c. 8, s. 2), were intended as a statement that the meanings of the two expressions were, in fact, different, and if such a statement is accurate; then a decision, however final and conclusive it may be, that a particular hereditament was not within one expression, may not be a decision that it was not within the other. Hence, a determination that the present Civil Bill action is maintainable necessarily involves a decision by us that the class of hereditaments exempted by 17 Vict. c. 8, s. 2, as being "of a public nature," or "occupied for the public service," is co-extensive with that described in 1 & 2 Vict. c. 56, s. 63, as being "dedicated to, or used for, public purposes."

The decision, however, of our Court of Appeal in 1898, in *The Commissioner of Valuation* v. *The Sligo Harbour Commissioners* (1), conclusively determines that they are co-extensive. Long previously individual Judges had expressed that opinion; and in 1897 a Divisional Court had, in the *Belfast Harbour Commissioners' Case* (2), arrived at the same conclusion. As I desire that the question may be now, for ever, laid at rest, I proceed to refer to those previous decisions.

In the *Londonderry Case* (3), in which the question arose upon the 63rd section of the Poor Law Act of 1838, O'Hagan, J. (afterwards Lord O'Hagan), relies upon the Valuation Acts, and expresses the opinion (4) that the entire of that code is "a continuous recognition and enforcement of the right to exemption from liability of tenements 'dedicated to public purposes,' as created by the Act of 1838," the principal statute of the other code. "The same phraseology," he observes, "is used substantially through them all." As to the words "and occupied for the public service," superadded in the 17 Vict. c. 8, s. 2, in the description of the exempted tenements, he says, p. 587: "But tenements of a public nature, and dedicated to public purposes, are occupied, *ex necessitate rei*, 'for the public service,'—that is, for the service of the public generally, to whose use and service they are so dedicated." And, after observing that the words "public service" are sometimes narrowed, in their practical application, to the

(1) [1899] 2 I. R. 214.
(2) [1897] 2 I. R. 516.
(3) I. R. 2 C. L. 577.
(4) At p. 586.

action of official persons, or of the servants of the State, he says that "this is not their only, their necessary, or generally their proper application—that taken in their literal and ordinary meaning, they are entirely consistent with the maintenance of an exemption expressly and deliberately secured by the law to the occupiers of property dedicated to public purposes."

To the same effect, substantially, is the judgment of Lord Justice Barry (then Barry, J.), in *The Mayor of Limerick* v. *The Commissioner of Valuation* (1)—a judgment of peculiar value here, because it was delivered after a consideration of the judgments in the *Londonderry Bridge Case* (2) of Mr. Baron Fitz Gerald and Chief Justice Monahan, which had been relied on there—just as, after a lapse of nearly forty years, they are relied upon here—as indicating a contrary opinion.

"If," says the Lord Justice, "either of those eminent Judges had decided, or even expressed a clear opinion, that the language of the 17 Vict. c. 8, s. 2, was to receive a more limited construction than the words of exemption in the Irish Poor Law Act, I should feel great difficulty in arriving at a different conclusion. But I do not so understand their judgments. . . I consider that they conveyed no more than this:—By the Poor Law Act, there is a clear exemption of certain premises; and we will not hold that such clear exemption from liability is taken away by a mere implication arising on the subsequent enactment."

And then he expresses himself in the following clear and emphatic words: "That being so, I hold myself at liberty to say that, whatever construction we put upon the 63rd section of the Poor Law Act, we must put the same construction upon the 2nd section of the Act of the 17 Vict. c. 8."

In that case, however, the decision was that the purposes for which the hereditaments in question there were used were not "public," and therefore I do not regard that case as an actual *decision* on the question, although the opinion is entitled to the greatest weight.

But then came the *Belfast Case* (3)—a decision upon the

(1) I. R. 6 C. L. 420.
(2) I. R. 2 C. L. 577.
(3) [1897] 2 I. R. 516.

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Valuation Acts—in which the *ratio decidendi* of the majority of the Judges was, that the Court was coerced, against what otherwise would have been the opinion of one at least of the Judges, to decide in favour of the exemption, by reason of the judgment in the *Londonderry Case* (1), which was decided solely on the Poor Law Act. The judgment of the dissenting Judge (Madden, J.) is equally in favour of this view, the ground of his dissent being that the nature of the user of the docks and works in question there was different from that of the bridge in the *Londonderry Case* (1). But as to the question now in hand, after referring to the Valuation Act of 1854 and the *Londonderry Case*, he says specifically (2): "Thus it appears that the question for our decision is whether the property of the Commissioners is 'dedicated to or used for public purposes,' within the meaning of 1 & 2 Vict. c. 56, s. 63."

So matters stood until the year 1897, when for the first time an appeal was given in cases of this description; and the opportunity was rapidly availed of by the Commissioner of Valuation for the purpose of setting this question at rest; and it resulted in the decision of the Court of Appeal in *The Commissioner of Valuation* v. *The Sligo Harbour Commissioners* (3). That was an important case. I remember myself, both when I was at the Bar, and afterwards when on the Bench, that there was considerable doubt upon the question there involved. It arose, as did those in the *Limerick Case* (4), and in the *Belfast Harbour Case* (5), not upon the Poor Law Acts, as did the *Londonderry Bridge Case* (1), but on the Valuation Acts; and the question was the rateability, under the 17 Vict. c. 8, s. 2, of the docks and works of the Sligo Harbour Commissioners. The decision was that the meaning of the expression "hereditaments of a public nature, occupied for the public service," in 17 Vict. c. 8, s. 2, was the same as that of the words, "dedicated to public purposes," in s. 63 of the 1 & 2 Vict. c. 56; and that the Court ought therefore to direct the hereditaments in question there to be distinguished by the Commissioner of Valuation under the

(1) I. R. 2 C. L. 577.
(2) [1897] 2 I. R., at p. 522.
(3) [1899] 2 I. R. 214.
(4) Ir. R. 6 C. L. 420.
(5) [1897] 2 I. R. 516.

17 Vict. c. 8, s. 2, because the Exchequer Chamber had in the *Londonderry Bridge Case* (1) decided that purposes such as those for which the docks and works in that case were used were "public purposes" within the meaning of the 1 & 2 Vict. c. 56—the Poor Law Act.

In his judgment there, Lord Justice Fitz Gibbon, in reference to the expression "hereditaments of a public nature" in sect. 15 of the Valuation Act of 1852, uses these words: "*Prima facie*, the scope of this section ought to be co-extensive with that of the exemption in the Act of 1838, section 63; and I cannot read the words used in 1852 as meaning anything more or less."

Lord Justice Holmes is even more explicit: "I am of opinion," he says, "that the words 'building, land, and hereditament dedicated to or used for public purposes,' in the 63rd section of the Irish Poor Law Act of 1838, and the words 'hereditaments of a public nature,' in the 2nd section of the Irish Valuation Act, 1854, mean the same thing. The words in the latter Act, if they stood alone, would seem to be wider than those in the previous statute; but they are followed in the same section by the words, 'so long as they shall continue to be of a public nature and occupied for the public service.' Taking together both branches of the clause, and bearing in mind that the two sections being still in force, and forming part of the same code, ought if possible to be read in harmony, I do not hesitate to give them an identical construction."

I have dealt with this question at considerable length. My reason for doing so is the respect I entertain for any opinion expressed by my late revered colleague, Mr. Baron Fitz Gerald, even when that opinion was not made (as I agree with Lord Justice Barry his words relied upon here were not made) part of his *ratio decidendi*.

The identity of the "public purposes" necessary and sufficient to entitle the occupier of hereditaments dedicated to or used for these purposes to exemption, under the Poor Law Code and the Valuation Code respectively, being thus established, the next contention of Mr. Fitz Gibbon is, that to validly constitute, as a

(1) I. R. 2 C. L. 577.

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condition precedent to exemption under the Act of 1838, a distinguishing of the hereditament by the Commissioner of Valuation, the enactment requiring the Commissioner to so distinguish it should be found either in that Act itself, or in some part of the Poor Law Code. I do not say that this contention has not some ground, in consequence of the words used by Chief Justice Monahan in the *Londonderry Bridge Case* (1). It brings the question to this: whether the judgment of the Recorder, upon an appeal under the Valuation Code, is a judgment *in rem* as to the nature of the user of those hereditaments? I cannot entertain any doubt that the decision of the Recorder is such a judgment.

I cannot regard the two series of Acts (viz., the Poor Law Acts on the one side, and the Valuation Acts on the other) as so wholly foreign to one another as Mr. Fitz Gibbon has argued. I agree with Lord Justice Holmes that they have now become part of one and the same code; the Valuation Acts supplementing the Poor Law Acts, and providing machinery for enabling the poor law rating authorities referred to in it to perform the duties imposed upon them by the Acts authorizing the rates, and thus incorporating them in the Rating Acts. The Valuation Acts not only relieve the rating authorities from the responsibility, but they deprive them of the power, of themselves making valuations of the rateable hereditaments. They impose this duty upon a Commissioner, who is to supply his valuation to the rating authorities; and the power of these bodies to rate is cut down to rating *according to the valuations* so supplied.

But certain hereditaments, *e.g.*, those used for public purposes, are not to be rated at all. These hereditaments are to be distinguished by the Commissioner of Valuation. Why? Plainly, as stated by Barry, J., in the *Limerick Case* (2), to enable the rating authorities to see at a glance what premises are, or are not, exempt from liability to taxation. But the rating authority cannot, in common sense, be responsible for an error committed by a wholly different authority; therefore the lists returned to them must be such as can be safely acted upon by the rating authority as the basis of a valid rate; and they cannot be so safely acted upon,

(1) I. R. 2 C. L. 577. (2) I. R. 6 C. L., p. 435.

unless they are "binding and conclusive on all parties" who may be affected by the rate. That they shall be so binding is effectively, with due regard to the rights of all parties, provided by the Valuation Acts—"with due regard to the rights of all parties," because an appeal is given by the Act of 1852 to any person aggrieved, and ample provision is made by section 22 of that Act for giving notice of such appeal to all interested parties. This appeal is to result in a judgment of the Recorder, which is declared to be "binding and conclusive on all parties to all intents and purposes whatsoever."

Such a judgment would be valueless for the purpose for which it is given, were it to be treated as a judgment *inter partes*. In my clear opinion it is a judgment *in rem*; and although that expression is not used in the judgment in *Moylan* v. *Dublin Port and Docks Board* (1), the meaning of the decision is that that was its true nature. Its character as a judgment cannot depend upon whether it is against exemption or in favour of it. Whatever be the judgment, it must have effect and operation upon the tables of valuation. Those tables must be acted upon in striking the rates to which they are applicable. If the judgment be one of exemption, the hereditaments exempted must be distinguished; and so long as they remain so distinguished in the tables in force, so long will there be an absence of jurisdiction in the rating authority to include them in a rate; and thus, by the terms of the Act, the decision, if one of exemption, has the effect of a judgment *in rem*. So, too, must the judgment have operation if the decision in effect determines rateability. In the present case this judgment *in rem* is a conclusive adjudication that the hereditament is exempt from rating, and, being exempt from rating, the defendant here, being the person "receiving rent in respect of it," is liable under 12 & 13 Vict. c. 104, s. 10, to be rated in respect of half such rent.

The informality of the mode in which the Commissioner has distinguished the hereditament, by merely marking it "exempt," instead of stating the fact by reason of which it is exempt, has rightly not been relied on. Agreeing, as I do entirely, with the

(1) I. R. 9 C. L. 457.

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observations made by Lord Justice Holmes on this matter in the *Cemeteries Case* (1), I think that the decision in *Moylan* v. *The Dublin Port and Docks Board* (2), in which, although it was stated that such a mode of distinguishing the hereditament was not critically accurate, yet it was held sufficient, ought to be followed in the present case. I think, however, that the attention of the Commissioner of Valuation should be called to the observations of Lord Justice Holmes, as the informality may possibly be more important if a question comes before us as to whether the mere distinguishing by the Commissioner himself, under the Act of 1854, unappealed from, does or does not in itself amount to a judgment *in rem*.

The question ought to be answered by stating that the defendant is estopped by the decision of the Recorder.

KENNY and WRIGHT, JJ., concurred.

Solicitor for the plaintiff: *W J. Shannon.*
Solicitors for the defendant: *Gerald Byrne & Co.*

J. M

(1) [1897] 2 I. R. 157. (2) I. R. 9 C. L. 457.

IN THE MATTER OF THE GENERAL VALUATION ACT, 1852, AND OF THE ACTS RELATING TO THE VALUATION OF RATEABLE PROPERTY IN IRELAND, AND IN THE MATTER OF THE GOVERNING BODY OF UNIVERSITY COLLEGE, CORK, APPELLANTS; THE COMMISSIONER OF VALUATION IN IRELAND, RESPONDENT (1).

K. B. Div. 1911. May 5, 9, 10. June 29.

Rating exemption—Hereditaments and buildings used for public or exclusively charitable purposes—University College—Fees paid by students bound by charitable trust—Parliamentary control over funds—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2.

University College, Cork, one of the constituent Colleges of the National University of Ireland, provided the highest class of education and instruction, and was open to all His Majesty's subjects; fees were charged to all students, these fees, however, were not payable to the professors, but were brought into the general funds of the College; the College was bound to present annual accounts of all receipts and expenditure to the Controller and Auditor-General, and these accounts, together with the report of the Controller and Auditor-General, had to be laid before Parliament.

Held, that on these facts the hereditaments and buildings of the College were exempt under the Irish Rating and Valuation Code, on the ground that such hereditaments and buildings were (*per* MADDEN and WRIGHT, JJ.) altogether of a public nature and used for public purposes; (*per* KENNY, J.) "exclusively charitable" in their objects, purposes, and user.

CASE STATED for the opinion of the King's Bench Division by the Recorder of Cork, under the provisions of 23 & 24 Vict. c. 4. The case came before the Recorder on appeal by the Governing Body of University College, Cork, against the decision of the Commissioner of Valuation that the said hereditaments and buildings were not exempt as being exclusively used for public or charitable purposes.

The following is a copy of the case stated:—

1. This was an appeal to the Trinity General Quarter

(1) Before MADDEN, KENNY, and WRIGHT, JJ.

K. B. Div. 1911.

UNIV. COLL., CORK v. COMMR. OF VALUATION.

Sessions of the Peace in and for the County Borough of Cork, commencing on the 24th day of June, 1910, pursuant to the 22nd section of the General Valuation Act, 1852, in respect of the lands, tenements, hereditaments, and premises, the property of University College, Cork, set out and appearing in the Revised Valuation List for the Electoral Divisions of Cork No. 5 Urban and No. 7 Urban, made and signed by the Commissioner of Valuation in Ireland, bearing date the 4th day of May, 1910, and was brought by the appellants on the grounds:—

(*a*) That the said premises are exempt from being rated by the Queen's Colleges (Ireland) Act, 1845, the Irish Universities Act, 1908, section 14, and the joint scheme made thereunder by the Dublin and Belfast Commissioners, 1909.

(*b*) That the said premises are of a public nature.

(*c*) That same are used for public purposes.

(*d*) That same are used exclusively for charitable purposes.

(*e*) That same are used for the purposes of Science, Literature, and the Fine Arts.

Alternatively, that the said premises should be distinguished in the Valuation Lists as being:—

(*a*) Of a public nature.

(*b*) Used for charitable purposes.

(*c*) Used for the purposes of Science, Literature, and the Fine Arts, pursuant to the provisions of section 2 of 17 Vict. c. 8.

2. The appeal was heard at the said Trinity Quarter Sessions of the Peace, on Monday, the 4th day of July, 1910. Mr. George Lawrence appeared for the appellants. Mr. Robert Doyle, K.C., appeared for the respondent.

No witness was examined before me; the facts and documents hereinafter set out were admitted before me.

3. The Queen's College, Cork, was, with other Colleges, established pursuant to the statute 8 & 9 Vict. c. 66.

4. By section 1 of said Act it was enacted that in case Her late Majesty should be pleased, by Letters Patent under the Great Seal of Ireland, to found one or more new Colleges for the

advancement of learning in Ireland, the Commissioners of Her said late Majesty's Treasury should be empowered, as therein provided, to charge the Consolidated Fund of the United Kingdom, and to direct to be issued and paid thereout, such sum of money as should be needed by the trustees thereinafter mentioned, for purchasing or providing lands, tenements, and hereditaments for the use of such College or Colleges, and for the necessary buildings, with the appurtenances thereof, and for establishing and furnishing the same, not exceeding the sum of one hundred thousand pounds in the whole.

5. By section 2 of said Act it was enacted that the Commissioners of Public Works in Ireland, for the time being, should be trustees for the purpose of purchasing or providing, as thereinafter mentioned, any buildings, lands, tenements, or hereditaments that might be necessary for the said Colleges, and the sites thereof, and the premises to be occupied therewith respectively, and for erecting thereon suitable buildings, and for repairing, enlarging, and improving the same from time to time and for upholding and furnishing the same from time to time, for the use of the said Colleges, respectively.

6. By section 3 of said Act it was enacted that for the purposes of said Act the said Commissioners of Public Works in Ireland, for the time being, and their successors, should be a Corporation by the name or style of "The Commissioners of Public Works in Ireland," and by that name, for the purposes of the said Act, should have perpetual succession, and a Common Seal, to be by them made, and from time to time altered as they should think fit, and should and might sue and be sued, plead or be impleaded, in all Courts and before all Justices, and others, and in that capacity should be deemed promoters of the undertaking authorized to be executed by said Act.

7. By section 4 of said Act it was enacted that in order to enable the said Commissioners of Public Works in Ireland to purchase and provide the buildings, lands, tenements, and hereditaments which might be required for the said Colleges, and the sites thereof, it should be lawful for the said Commissioners, with the approval of the Commissioners of Her said late Majesty's Treasury, to contract and agree with any person

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or persons, or body or bodies corporate, for the purchase or renting of any buildings, lands, tenements, or hereditaments required for such Colleges, or the sites thereof, and also for the purchase of any subsisting leases, terms, estates, or interests therein, or charges thereon; and the buildings, lands, tenements, or hereditaments so contracted and agreed for should be conveyed, assigned, or demised for or in trust for Her said late Majesty, Her heirs and successors, in such manner and form as the said Commissioners of Her said late Majesty's Treasury should direct.

8. By section 6 of said Act it was enacted that it should be lawful for the said Commissioners of Public Works, if they should be so directed by the Commissioners of Her said late Majesty's Treasury, to employ surveyors and architects to make surveys and estimates of any of the said proposed works, and to prepare such plans, sections, and specifications as might be necessary, and send the same to the Commissioners of Her said late Majesty's Treasury for their approval; and that if the said Commissioners of Her said late Majesty's Treasury should think fit to authorize the work in any such plan, section, or specification, or any modification thereof which they might think proper, to be undertaken, they should by warrant under their hands direct the said Commissioners of Public Works to execute such work at and for an amount not exceeding a sum to be specified in such warrant; and the said Commissioners of Public Works should, upon receipt of such warrant, forthwith cause the construction of the work mentioned therein to be proceeded with.

9. By section 7 of said Act it was enacted that the said Commissioners of Public Works should cause detailed accounts, in writing, of their proceedings under the said Act, of the several sums received by them as such Commissioners for the purposes of the said Act, and of the sums expended by them for such purposes, and the mode of such expenditure, and the several works made or in progress under the said Act, to be made up to the 31st day of December in each year; and that such accounts should be laid before Parliament, as therein provided; and that the said Commissioners should, as often as required so to do by the

Commissioners of Her said late Majesty's Treasury, transmit to the said Commissioners of the Treasury like accounts made up to such period as the said Commissioners of the Treasury should direct; and that it should be lawful for the said Commissioners of Her said late Majesty's Treasury to give such directions as they should think proper, defining the duties of the said Commissioners of Public Works in the execution of the said Act; and the said Commissioners of Public Works should observe all such directions as aforesaid which should, from to time, be signified to them by the said Commissioners of Her said late Majesty's Treasury.

10. By section 9 of the said Act it was enacted that it should not be lawful for any College, within the provisions of the said Act, to alien, mortgage, charge or demise any lands, tenements, or hereditaments to which it might become entitled, unless with the approval of the Commissioners of Her said late Majesty's Treasury, except by way of lease for any term not exceeding thirty-one years, and subject to the provisions as to rent in said section contained.

11. By section 12 of the said Act it was enacted that the said Commissioners of Her said late Majesty's Treasury should be empowered by warrant as therein to charge the said Consolidated Fund, and to direct to be issued or paid thereout, by four equal quarterly payments, as therein mentioned, in each year, such sums of money as should be needed for defraying the several stipends which should be by Her said late Majesty appointed to be paid to the President and Vice-President, and to such Professors in the several Faculties of Arts, Laws, and Physic, as should be from time to time established by Her said late Majesty, Her heirs, and successors, and to the Bursar, Registrar, Librarian, and other office-bearers and servants in each of the said Colleges, and for defraying the expense of such prizes and exhibitions as should be by Her said late Majesty, Her heirs and successors, awarded for the encouragement and reward of students in each of the said Colleges, not exceeding in any one year the sum of £7,000 for every such College, or the sum of £21,000 in the whole.

12. By section 20 of the said Act, it was enacted that every such College which should be established and endowed under the

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said Act, should once at least in every year, and also whenever Her said late Majesty's pleasure should be signified in that behalf, report to Her said late Majesty its proceedings, and that a copy of every such report should be laid before Parliament as therein provided.

13. The said Queen's College, Cork, was duly founded and constituted by Letters Patent under the Great Seal of Ireland of Her said late Majesty Queen Victoria, dated the 12th day of October, 1863, revoking Her Majesty's previous Letters Patent under the Great Seal of Ireland, dated the 30th day of December, 1846, and 11th day of December, 1849.

14. Certain lands, buildings, tenements, and hereditaments were, in pursuance of the said Act 8 & 9 Vict. c. 66, purchased or acquired for the purposes of said College, with moneys provided by the Commissioners of Her said late Majesty's Treasury out of the Consolidated Fund, and same have been upheld and maintained by the Commissioners of Public Works in Ireland, for the time being, out of moneys annually provided by Parliament for that purpose.

15. The said lands, buildings, tenements, and hereditaments have, each year, been distinguished by the Commissioner of Valuation in the Lists or Tables of Valuation made by him as being exempt from assessment, and the said College did not, accordingly, pay any rates in respect of same. A bounty has been, for many years past, paid by the Treasury to the authorities for the collection of poor rate in Cork, in lieu of rates upon said lands, buildings, tenements, and hereditaments.

16. The Irish Universities Act, 1908, 8 Edw. 7, c. 38, was passed on the 1st day of August, 1908. Section 1 thereof, sub-section 1, provided that His late Majesty might, if pleased to do so, by charter found two new Universities in Ireland (in said Act referred to as the New Universities), those Universities respectively to have their seats at Dublin and Belfast. Sub-section 2 provided that the two Universities should be bodies corporate under such names as His late Majesty might be pleased to determine, and that the governing bodies of the Universities should, until the expiration of five years from the day appointed for the dissolution of the Royal University of Ireland, consist of such number of

persons nominated by His late Majesty as His late Majesty should determine, and after the expiration of that time should be constituted in manner provided by the First Schedule to the said Act.

Sub-section 3 provided that the Royal University of Ireland and Queen's College, Belfast, should be dissolved as from the appointed day.

17. By section 2, sub-section 1, it was enacted that His late Majesty might, if pleased to do so, by charter found a new college to have its seat at Dublin.

Sub-section 2 provided that such college should be a body corporate under such name as His late Majesty might be pleased to determine, and that the governing body of the College should be constituted in manner provided by the charter.

Sub-section 3 provided as follows:—"Queen's College, Cork, Queen's College, Galway, and the new College, having its seat at Dublin, shall be constituent Colleges of the New University having its seat at Dublin; and, for the purpose of making any alterations in the constitution or government of Queen's College, Cork, or Queen's College, Galway, which the passing of this Act renders it expedient to make by charter, His Majesty may, if pleased to do so, either alter the charter existing at the time of the passing of this Act, or grant a new charter in lieu thereof, and may, if pleased to do so, alter the name of those colleges, or either of them, and provision shall be made by any such new charter, or alteration of an existing charter, for adequate representation of graduates and professors on the governing bodies of the constituent Colleges."

18. By section 4, sub-section 1, of the said Act, it was enacted that the statutes for the general government of the New Universities, and the constituent Colleges of the New University, having its seat at Dublin, should be made in the first instance, as respects the statutes of the New University having its seat at Dublin, and the constituent Colleges thereof, by the Dublin Commissioners appointed under the said Act.

19. Section 7 of the said Act provides as follows:—

(1) "The sum of twenty thousand pounds payable under the Royal University of Ireland Act, 1881, shall, instead of being paid as provided by that Act, be paid as to one-half

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thereof to the new University, having its seat at Dublin, and as to one-half thereof to the new University having its seat at Belfast."

(2) "There shall be annually paid out of moneys provided by Parliament for the general purposes of the New University having its seat at Belfast, and the constituent Colleges of the New University having its seat at Dublin, the sums specified in Part I. of the Third Schedule to this Act." The annual sum set out in the said Third Schedule as payable for Queen's College, Cork, for the purposes aforesaid, is the sum of £20,000.

(3) "There shall be paid out of moneys provided by Parliament such sums as the governing body of either of the New Universities, or any of the constituent Colleges of the New University, having its seat at Dublin, may require, and the Treasury may approve, for purchasing lands and providing or improving the necessary buildings and equipment for the University or College, not exceeding the maximum sum specified in Part II. of the Third Schedule to this Act." The maximum sum specified in said Third Schedule, Part II., as applicable to the Queen's College, Cork, is the sum of £14,000.

(4) "Any sums paid under this section shall be applied by the governing body of the University or College, as the case may be, in accordance with their charter or statutes."

(5) "The grants paid under this section shall be in lieu of any grants payable at the time of the passing of this Act, either out of the Consolidated Fund or moneys provided by Parliament, to or for the benefit of the Royal University of Ireland, Queen's College, Belfast, Queen's College, Cork, or Queen's College, Galway, and shall be deemed to be in full discharge of all past or present claims of any such University or College, or of any person holding or having held any office in any such University or College, to be maintained or paid out of public money, or to receive any portion of public money by way of salary, pension, allowance, or otherwise, in respect of that office, and the liability to meet any such claim shall, for the purposes of this Act, be treated as a liability of the University or College in connexion with which the claim arises."

"Any such liability to meet a claim for pensions shall be a first charge upon any money provided by Parliament under this section for the purposes of the University or College liable to meet the claim."

(6) "The governing body of each of the New Universities, and the governing bodies of the constituent Colleges of the New University, having its seat at Dublin, respectively, shall prepare annually, in such form as the Treasury shall direct, accounts of all receipts and expenditure, capital and income, under their control, and within three months after the expiration of the year to which the accounts relate, shall transmit the same to the Controller and Auditor-General to be audited, certified, and reported upon in conformity with the powers and regulations prescribed in the Exchequer and Audit Departments Act, 1866, for rendering and auditing appropriation accounts, and the accounts, with the reports of the Controller and Auditor-General thereon, shall be laid before the House of Commons not later than three months after the date on which they were transmitted for audit, if Parliament be then sitting, and, if not sitting, within fourteen days after Parliament next assembles."

(7) "Nothing in this section shall preclude any money being provided by Parliament in addition to the sums provided under this section, either in augmentation of any sums contributed for the purpose of the Universities or Colleges from other sources, or otherwise."

20. Section 14 of the said Act provides as follows:—

(1) "The buildings of the Royal University of Ireland and of Queen's College, Belfast (together with the equipment and appurtenances thereof), shall, by virtue of this Act, and without any further assurance, be transferred to and become vested in the New University, having its seat at Dublin, and the New University having its seat at Belfast, respectively, except such buildings of the Royal University of Ireland (if any) as may be appropriated to the new College, having its seat at Dublin, by virtue of a scheme made by the Dublin Commissioners under this section."

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By sub-section 2 of the said 14th section the Commissioners were empowered jointly to make a scheme :—

(*a*) For transferring to one or other of the New Universities any property, real or personal, of the Royal University of Ireland, or Queen's College, Belfast (including trust property), not transferred by virtue of the said Act.

(*b*) For transferring to one or other of the New Universities any right, powers, liabilities, or obligations of the Royal University of Ireland, or Queen's College, Belfast, or any members or officers thereof, or attaching to the property thereof.

(*c*) For making any alteration in the terms of any trust which may be rendered necessary or proper in consequence of the dissolution of the Royal University of Ireland or Queen's College, Belfast.

21. Sub-section 4 of said 14th section of the said Act provides as follows:

"Any buildings or property held by the Commissioners of Public Works in Ireland for the purpose of Queen's College, Belfast, shall, for the purposes of this section, be deemed to be property of Queen's College, Belfast, and any buildings or property held by those Commissioners for the purpose of Queen's College, Cork, and Queen's College, Galway, shall, by virtue of this Act, become vested in those Colleges respectively."

22. By section 21 of the said Act, the entire Act 8 & 9 Vict. c. 66 was repealed.

23. The New University, having its seat at Dublin, contemplated by the said Act, was duly founded by His late said Majesty by a charter bearing date the 2nd day of December, 1908, and by the said charter the said University was incorporated under the name of "The National University of Ireland."

24. The new charters contemplated by the said Act were granted by His said late Majesty on the 2nd day of December, 1908, and by the charter granted to the Queen's College, Cork, the name and style of the said Queen's College, Cork, was changed to "University College, Cork."

25. The Dublin Commissioners appointed under the said Act duly made and published under their seal a Statute dated the 15th day of May, 1909, for the general government of the said National University of Ireland, the constituent Colleges thereof being :—(*a*) University College, Dublin ; (*b*) University College, Cork ; (*c*) University College, Galway.

25*a*. The Dublin Commission also duly made and published on the said date a statute for the general government of the Constituent College at Cork under the style of University College, Cork.

The Court is to be at liberty to refer to the several Acts of Parliament, charters, and statutes hereinbefore mentioned.

26. On the 24th February, 1910, the Town Clerk of Cork Poor Law Union transmitted to the Commissioner of Valuation a list of the property requiring revision in the said Union, among which was set out the property of University College, Cork.

27. The Commissioner of Valuation made out and signed a revised list of the rateable hereditaments and tenements within the Cork Poor Law Union, a copy whereof was duly transmitted to the Guardians of the Cork Poor Law Union, and published as prescribed by the Valuation Acts.

28. In such revised list the said property of University College, Cork, was transferred from the list of premises distinguished as being exempt from valuation to the list of rateable hereditaments.

29. The Governing Body of University College, Cork, being dissatisfied with such action of the Commissioner of Valuation, duly lodged with the said clerk a notice pursuant to 15 & 16 Vict. c. 63, sect. 19, and said clerk forwarded such notice to the Commissioner of Valuation.

30. Upon receipt of said notice, the Commissioner of Valuation inquired into the subject-matter thereof, but refused to distinguish the said hereditaments and tenements as being of a public nature, or to include them in the list of exemptions, or otherwise to distinguish them in the valuation lists as exempt from assessment for the relief of the destitute poor ; and he fixed the rateable annual value of same at the aggregate sum of £810 15*s* 0*d*.

Against such decision of the Commissioner the present appeal was then duly taken.

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31. On the hearing of the appeal, Mr. Lawrence stated the case for the appellants, and contended that the premises ought to be distinguished in the valuation lists as being of a public nature and used exclusively for public, scientific, and charitable purposes. He relied upon the provisions of the 8 & 9 Vict. c. 66, and the Irish Universities Act, 1908, 8 Edw. 7, c. 38, and upon several decided cases.

Mr. Robert Doyle, for the respondent, contended that the premises could not be deemed to be used exclusively for public or scientific or charitable purposes, that the cases cited by Mr. Lawrence were distinguishable, and that, having regard to the provisions of the said Acts of Parliament, the Commissioner of Valuation was right in returning the premises as liable to contribute to the rates.

Mr. Lawrence also contended that the premises were hereditaments dedicated to or used for the purposes within the meaning of the Poor Law Act, 1 & 2 Vict. c. 56, s. 63, and exempt from rating, also that the premises were hereditaments of a public nature or used for charitable or scientific purposes within the meaning of 17 & 18 Vict. c. 8, sect. 2, and ought to be distinguished in the valuation lists as being of a public nature and used altogether for public, charitable, or scientific purposes.

32. I was of opinion, having regard to the principles laid down and applied in the cases cited for the appellants, that the premises are altogether of a public nature, and used for public purposes within the meaning of 15 & 16 Vict. c. 63, sect. 16, and 17 & 18 Vict. c. 8, sect. 2, and I, accordingly, allowed the appeal, and ordered the respondent to alter and amend his revised list of valuation by therein and thereby distinguishing the said premises as being premises of a public nature and used exclusively for public purposes. I further ordered that the appellants and the respondent should abide their own costs of said appeal. I gave no decision on the question whether the premises were used exclusively for charitable purposes.

33. On the 30th day of September, 1910, I received the notice, in writing, dated the 29th day of September, 1910, hereto attached, signed by the Commissioner of Valuation, requiring me, pursuant to the 10th section of the Annual Revision of

Rateable Property (Ireland) Amendment Act, 1860, to state and sign a case setting forth the facts and grounds of my decision for the opinion of one of the Superior Courts of law at Dublin.

34. In compliance with such requisition, I, accordingly, state this case.

The question for the opinion of the Court is:—Are the said hereditaments and premises of a public nature within the meaning of the said Acts, and was I right in directing the respondent to distinguish the same in his said revised list of valuation as being hereditaments and premises of a public nature, and used exclusively for public purposes?

(Signed), M. J. BOURKE.

The Solicitor-General (*C. A. O'Connor, K.C.*), *Doyle, K.C.*, and *Hon. Cecil Atkinson*, for the Commissioner of Valuation.

Ronan, K.C., and *Lawrence*, for the Governing Body of University College, Cork.

The arguments and the authorities cited (save those noted below) appear fully from the judgments.

The following cases, in addition to those referred to in the judgments, were cited in the course of the argument:—*Mayor of Limerick* v. *Commissioner of Valuation* (1); *Commissioner of Valuation* v. *O'Connell* (2); *Governors of Charterhouse School* v. *Lavargue* (3); *Royal College of Surgeons Case* (4); *The Queen* (*Teape*) v. *Guardians of Mitchelstown Union* (5).

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This is a case stated by the Recorder of Cork at the instance of the Commissioner of Valuation under the provisions of the Annual Revision of Rateable Property (Ireland) Act, 1860. It raises an important question as to the liability of lands and premises held by University College, Cork, to be rated in respect of

(1) I. R. 6 C. L. 420.
(2) [1906] 2 I. R. 79.
(3) 25 Q. B. D. 121.
(4) [1899] 1 Q. B. 871.
(5) 4 Ir. C. L. R. 590.

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poor-rate under the provisions of the Irish Valuation Acts. By the 2nd section of the Valuation Act of 1854, the duty was imposed on the Commissioner of Valuation, in making out the lists or tables of valuation prescribed by the Valuation Act of 1852, of distinguishing all hereditaments and tenements, or portions of the same, of a public nature, or used for charitable purposes, with other specified classes of property; and the statute provides that all such hereditaments or tenements, or portions of the same so distinguished, shall, so long as they shall continue to be of a public nature, and occupied for the public service, or used for the purposes aforesaid, be deemed to be exempt from all assessment for the relief of the destitute poor in Ireland. The assessment is made by the Commissioner of Valuation for the purpose of carrying into effect the provisions of the Poor Relief (Ireland) Act of 1838. The 63rd section of this Act, in defining the hereditaments which should be rateable under its provisions, contained a proviso, the terms of which, so far as applicable to the present case, are as follows: "Provided also that no . . . building used exclusively for charitable purposes, nor any building, land, or hereditament, dedicated to or used for public purposes, shall be rateable, except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated as an occupier, according to the annual value of such profit or use." The 16th section of the Valuation Act, 1852, which is to be read with the 2nd section of the Act of 1854, provides that for the purposes of valuation "no hereditaments or tenements, or portions of the same, shall be deemed to be of a public nature, or used for such charitable, scientific, or other purposes as hereinbefore specified within the meaning of this Act, unless such hereditaments or tenements, or portions of the same respectively, shall be altogether of a public nature, or used exclusively for such charitable, scientific, or other purposes aforesaid." These are the statutory provisions which I shall have occasion hereafter to consider in detail.

The lands and hereditaments which are now the property of University College, Cork, were at the time of the passing of the Irish Universities Act of 1908 the property of the Crown held for the purposes of Queen's College, Cork. This College was founded

by Letters Patent of Her late Majesty Queen Victoria, dated the 30th December, 1846. It was endowed under the provisions of 8 & 9 Vict. c. 66, entitled "an Act to enable Her Majesty to found new colleges for the advancement of learning in Ireland." This statute, as stated in the preamble, was passed "for the better advancement of learning among all classes of Her Majesty's subjects in Ireland." By this statute a grant of £100,000 was provided for the purchase of land, and the erection of buildings for the purposes of such new colleges as Her Majesty should be pleased to found by Letters Patent, one of which was Queen's College, Cork. The Commissioners of Public Works were empowered, with the consent of the Treasury, to purchase or rent any building or lands required for the college, and it was enacted that the buildings and lands so acquired should be "conveyed, assigned, or demised for or in trust for Her Majesty, Her heirs, and successors, in such manner and form as the Commissioners of Her Majesty's Treasury should direct."

The lands and buildings with which this case is conversant were acquired under the provisions of this statute, and thereupon became the property of the Crown, dedicated to the use of the Queen's College, Cork. The buildings and other property of the College were maintained by the Board of Works out of moneys annually provided by Parliament. They were distinguished by the Commissioner of Valuation in his lists and tables as exempt from assessment. No rates were in fact paid by the College, the Treasury paying the usual bounty in aid of local taxation; and so matters continued until the passing of the Irish Universities Act of 1908.

The relations of the Queen's College, Cork, to the Queen's University and to its successor, the Royal University, established in 1878, are not material for the purposes of the present case. It is sufficient to say that they were completely altered by the Universities Act of 1908. That statute was passed with a view to the foundation by charter of two new universities in Ireland, one of which was to have its seat in Dublin, and the other in Belfast. In view of the foundation of the University to be seated in Dublin, the Royal University was dissolved as from an appointed day, and in view of the foundation of a University in

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Belfast, Queen's College, Belfast, was similarly dissolved. Queen's College, Cork, was not dissolved. Its corporate character was continued, subject to modification by a new charter or letters patent to be granted by the Crown, and its relation to the new University to be founded in Dublin was defined. This university was founded by His late Majesty Edward 7, on the 2nd December, 1908, and incorporated under the title of "The National University." Thereupon, under the provisions of the Universities Act of that year, Queen's College, Cork, became a constituent College of that University. The constituent colleges were to be three in number—a new college to be founded by charter in Dublin, Queen's College, Cork, and Queen's College, Galway. The relations of these colleges to the National University of Ireland are thus defined by the statute (section 2, sub-section (3)):—"Queen's College, Cork, Queen's College, Galway, and the new college, having its seat at Dublin, shall be constituent colleges of the new University having its seat at Dublin." For the purpose of making any alterations in the constitution or government of Queen's College, Cork, or Queen's College, Galway, which were rendered expedient by the passing of the Act, it was provided that the existing charters might be altered, or new charters granted.

A new charter was accordingly granted by His late Majesty on the 2nd December, 1908, which preserved the continuity of the college, which was originally founded by the charter of the 30th December, 1846, and dealt with by subsequent charters, which was to remain and continue one body corporate, with perpetual succession, and a common seal, having power to hold and dispose of real and personal property, without further licence in mortmain.

The endowment of the new college was provided by the Universities Act of 1908, section 7. The sum of £20,000 was to be paid annually out of moneys provided by Parliament for the purposes of the college. There was also to be provided from the same source, with the approval of the Treasury, such sums, not exceeding in the whole £14,000, as the governing body might require for purchasing lands, or providing and improving the necessary buildings and equipment for the college.

Section 7, sub-section (6), provides that the governing body "shall prepare annually, in such form as the Treasury shall direct,

accounts of all receipts and expenditure, capital and income, under their control, and within three months after the expiration of the year to which the accounts relate, shall transmit the same to the Controller and Auditor-General to be audited, certified, and reported upon in conformity with the powers and regulations prescribed in the Exchequer and Audit Departments Act, 1866, for rendering and auditing appropriation accounts, and the accounts, with the reports of the Controller and Auditor-General thereon, shall be laid before the House of Commons not later than three months after the date on which they were transmitted for audit, if Parliament be then sitting, and, if not sitting, within fourteen days after Parliament next assembles."

By sub-section (4) of the 14th section of this Act any property or buildings held by the Commissioners of Public Works in Ireland for the purposes of Queen's College, Cork, became, by virtue of the Act, vested in University College, Cork.

The constitution and powers of the College are clearly defined by the charter, and by the statute made by the Dublin Commissioners appointed under the provisions of the Universities Act, 1908. It is not necessary to enter into the details of those documents. In the statute prepared by the Dublin Commissioners under the Act of Parliament the authorities of University College, Cork, have the advantage of possessing in a single clearly expressed document the entire of the College legislation, a good fortune which may well excite the envy of those upon whom the duty devolves of reducing to unity and consistency a mass of charters, Acts of Parliament, Letters Patent, and decrees, the accumulated result of centuries of intermittent legislation. The statute provides the machinery by which the educational purposes for which the College was founded, as stated in the charter, are to be carried into effect. These are—(1) to teach students who are seeking to obtain any degree or other academic distinction which the University confers; (2) to provide teaching for other purposes, so far as means are available, and generally to promote the advancement and dissemination of knowledge; (3), to provide facilities for the prosecution of original research in science, literature, or other subjects taught in the College, and especially in the application of science.

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The governing body of the College was, in the first instance, nominated by the Crown. Ultimately it will consist of twenty-nine members—The President; three nominated by the Crown; two appointed by the Senate of the University; six elected by the Professors of the College; four by Graduates of the University; the Lord Mayor of Cork; the Mayors of Limerick and Waterford; representatives of the County Councils of Cork, Waterford, Kerry, Limerick, and Tipperary, and four co-opted members. The introduction of a popularly elected element into the governing body is relied on as evidence of the dedication of the College to public purposes. I need not enter in detail into the functions of the governing body and the Academic Council which is specially charged with educational matters. The College is open to all, and without distinction of class, creed, or residence. The liberality of the foundation is further evidenced by the provision in the charter and the statute that "women shall be eligible equally with men to become members of the College, or of the governing body of the College, and to hold any office, or enjoy any advantages of the College."

Under the provisions of the charter "the College may demand and receive such fees as the governing body may appoint," and it is specially provided that "the College shall not make any gift, division, or bonus in money unto or between any of its members." The application of the fees is regulated by the statute. They are not paid directly to the Professors and Lecturers, who receive salaries at specified rates.

Such being the constitution and character of University College, Cork, are its buildings exclusively used for charitable purposes? This is the first question submitted for our consideration—That the general purpose for which the institution was founded and maintained—the education of youth—is charitable was not disputed. But it was contended that, inasmuch as the college was used for the purpose of the acquisition of revenue in the form of fees paid by students, the user was not exclusively for charitable purposes, and that the present case is governed by the decisions of this Court in *Trustees of Mayee College* v. *Commissioner of Valuation* (1) and *Dublin Cemeteries Committee* v. *Commissioner of Valuation* (2). In the former of these cases the Court of Queen's

(1) I. R. 4 C. L. 438.

(2) [1897] 2 I. R. 157.

Bench in Ireland applied to the construction of the Irish Poor Law Act decisions of the English Court of Queen's Bench upon the statute of Elizabeth. This statute contains no express exemption of property used for charitable purposes. It was, however, held by the Courts that occupation to be rateable must be beneficial, that is to say, "of value beyond that which is required to maintain the property." The word "beneficial" does not occur in the statute, but it was held to be implied from the nature of the direction given to the overseers, and from the reference to the "ability" of the parish. The decision of the English Courts depended on the word "beneficial," which had been in this manner imported into the statute. When the user was purely for charitable purposes it was not beneficial to the occupier; but when the occupation of a building or other property used for charitable purposes brought in a revenue, it was held that the occupation was, to this extent, beneficial, from which it followed that the property by means of which the revenue was earned was not used exclusively for charitable purposes.

In *Rex* v. *Inhabitants of St. Giles* (1) certain premises were vested in trustees for the purposes of a lunatic asylum. The institution was, in the main, charitable, but affluent patients were admitted on rates proportional to their means. The trustees derived no benefit from the funds, and the accumulations of revenue were applied or retained for the benefit of the institute. "It seems to us impossible to say that this building does not produce a profit by means of the entertainment of those persons who are able to pay for their reception; and, if any profit be made, the application of it when made is immaterial as to the question of rateability" (*per* Lord Tenterden, C.J., p. 579).

In *The Queen* v. *Sterry* (2) certain premises were used for charitable purposes as a school. The children were maintained out of the funds of the institution. These funds consisted in part of a sum of £12 per annum paid in respect of each child. "This sum, it is true, is not adequate to the expense, and, in a popular sense, does not make the occupation of the premises beneficial, *i.e.* gainful; but still it is a revenue which the building produces,

(1) 3 B. & Ad. 573. (2) 12 Ad. & Ell. 84.

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and actual gain on a balance of profit and loss is not needful: it is enough if a revenue be produced" (*per* Lord Denman, C.J., p. 93).

The framers of the Irish Poor Law Act no doubt intended to give statutory effect in this country to the exemption in respect of charitable user which had been imported into the English statute by judicial decision. But by a reference to the "purposes" of the user, as determining its charitable character, they made a departure from the judge-made law which prevailed in England. Lord Chelmsford, in *Mersey Docks* v. *Cameron* (1), thus explains the decisions of the English Court of Queen's Bench to which I have referred:—"If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish, but if it is productive (although not profitable) there is nothing in the Act which requires the overseers to follow the produce in its subsequent application." In other words the Act is not conversant with the "purposes" of the occupation.

In the *Magee College Case* (2) the general purposes of the institution were charitable, and its entire funds were applicable to its maintenance, but inasmuch as fees were paid by students to the professors, it was held by the majority of the Court of Queen's Bench that the college was not exclusively used for charitable purposes, apparently on the ground that the occupation was in part "beneficial," a word which was not imported into the Irish statute. Fitz Gerald, J., expressed doubt whether the College did not come within the terms of the Valuation Acts, as "hereditaments used for charitable purposes." The entire revenue of the College, including the fees received from students, was impressed with a charitable trust, and the view which presented itself to the mind of the learned Judge evidently was that the purposes to which the funds of the College were applied were exclusively charitable.

This decision has come under the consideration of this Court in several subsequent cases. In *The Cemeteries Committee* v. *Commissioner of Valuation* (3) the surplus proceeds of the undertaking were not bound by any charitable trust, and in this respect the case was distinguishable from the *Magee College Case* (2). It was held (O'Brien, J., diss.) that the property of the committee was not held exclusively for charitable purposes. Holmes, L.J.,

(1) 11 H. of L. Cases, 443, at p. 519.
(2) I. R. 4 C. L. 438.
(3) [1897] 2 I. R. 157.

then Holmes, J., regarded the distinction to which I have called attention as irrelevant, resting his judgment upon the English decisions which I have noted, and *Reg.* v. *Baptist Missionary Society* (1). "One clear principle can be gathered from them, namely, that when lands and buildings belonging to a charitable foundation are so used as to bring in profit or income, they cannot be said to be used exclusively for charitable purposes notwithstanding that such profit or income is added to the funds of the charity" (at p. 171).

In *The Guardians of the Waterford Union* v. *Barton* (2) a training-college in the occupation of a Roman Catholic religious community, and used for educational purposes, was held not to be used exclusively for charitable purposes by reason of the receipt from a certain class of pupils of yearly fees of £50 each. These fees were applied in the first instance in the maintenance of the pupils by whom they were paid, and the surplus, if any, was in fact, carried to the credit of the National Board, by which the institution was in part supported. But although this was so in fact, the managers were under no legal obligation to apply the surplus in this manner, a circumstance which was, in the opinion of the Lord Chief Baron, material on the question of exclusive charitable user. Having referred to such cases as *The Queen* v. *Sterry* (3), he says:—"I desire to guard myself against the expression of any opinion as to the application of the passage I have read to the interpretation of our statute law, in reference to a case in which the *entire* possible profit from the occupation is bound by an enforceable charitable trust" (p. 553). And later on "had it appeared that under the rules of the National Board there was an *obligation* upon the managers of the College to bring to the credit of the National Board the profit, if any, which was derived from these paying pupils over and above their maintenance, a question would have arisen upon which I do not express, and, indeed, have not formed, any opinion. To determine it, it would be necessary to consider whether the passages which I have read from the judgment of Lord Denman in *The Queen* v. *Sterry* (3) and which were applied by Mr. Justice O'Brien in *The Magee College Case* (4) are applicable to such a case" (p. 554).

(1) 10 Q. B. 884.
(2) [1896] 2 I. R. 538.
(3) 12 Ad. & Ell. 84.
(4) I. R. 4 C. L. 438.

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The entire revenue derived by University College, Cork, from students' fees is bound by a compulsory trust for the charitable purpose of education. This results not only from the general scope of the Act of Parliament, charter, and university statutes, but from the express words of the 15th clause of the charter which prohibits "the making by the College of any gift, division, or bonus in money unto or between any of its members," except for certain specified educational purposes. The College would therefore appear to be an institution of a charitable character to which the observations of the Lord Chief Baron would apply. If the authority of *The Magee College Case* (1) is to be questioned it cannot be in this Court.

I can find no substantial distinction between the position of University College, Cork, and Magee College, so far as regards the receipt of fees from students. In both cases the fees so received must be applied for the general purposes of the institution, which are charitable. The judgment of the Court of Queen's Bench, in *The Magee College Case* (1), as interpreted by Holmes, L.J., in the passage which I have quoted from his judgment in *The Cemeteries Committee Case* (2), is in my opinion applicable to the facts of the present case. The authority of that decision has not been questioned in any of the cases to which I have referred, and applying the principle of that decision, I hold that the user of its property by University College, is not exclusively for charitable purposes within the meaning of the Valuation Acts and Poor Relief Act.

I proceed to consider whether University College, Cork, comes within the statutory exemption contained in the second section of the Valuation Act of 1854 by which "all hereditaments and tenements, or portions of the same of a public nature," are to be distinguished in the lists or tables of valuation. The language of the 16th section of the Act of 1852 is somewhat different: "No hereditaments, or tenements, or portions of the same, shall be deemed to be of a public nature . . . within the meaning of this Act, unless such hereditaments or tenements, or portions of the same respectively, shall be altogether of a public

(1) I. R. 4 C. L. 438. (2) [1897] 2 I. R. 157.

nature." The section of the Poor Relief Act of 1838, which exempts from rateability hereditaments so distinguished under the Valuation Acts, is as follows: "No . . . building, land, or hereditament, dedicated to or used for public purposes shall be rateable, except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated as an occupier according to the annual value of such profit or use."

No difficulty is caused by this variance in phraseology. "I am of opinion that the words, 'building, land, and hereditament dedicated to or used for public purposes' in the 63rd section of the Irish Poor Law Act of 1838, and the words, 'hereditaments of a public nature' in the second section of the Irish Valuation Act, 1854, mean the same thing. "The words in the later Act, if they stood alone, would seem to be wider than those in the previous statute; but they are followed in the same section by the words, 'so long as they shall continue to be of a public nature and occupied for the public service.' Taking together both branches of the clause, and bearing in mind that the two sections, being still in force, and forming part of the same code, ought, if possible, to be read in harmony, I do not hesitate to give them an identical construction." (Holmes, L.J., in *Sligo Harbour Case* (1), at p. 227.)

Those words were introduced into the Irish Acts, in view of a series of decisions upon the English statute, which were regarded as good law when the Act of 1838 was passed. Indeed, as was said by Fitz Gibbon, L.J., adopting an argument of Mr. Ronan, the kind of property which was held by those decisions as exempt from taxation was properly described "in the very words, 'property of a public nature' or 'property, used or occupied for public purposes' which the Irish Acts have employed in expressly defining what is to be distinguished by the Commissioner of Valuation, and to be exempted in this country:" *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1).

The statute of Elizabeth contained no express exemption of lands or hereditaments held for public purposes. As I have already pointed out, it was held that occupation to be taxable

(1) [1899] 2 I. R., at p. 225.

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should be "beneficial," that is, in the words of Blackburn, J., in the *Mersey Docks Case* (1), "of value beyond what is required to maintain the property." In a long series of cases, some of which (according to Lord Westbury) are irreconcilable with each other, the principle was acted on and applied, that where a corporation or trustees occupying valuable property were prohibited from taking any individual benefit from their occupation, they were not rateable. In such a case it was held that the occupation was not beneficial.

These cases come under the consideration of the House of Lords in *Mersey Docks* v. *Cameron* (1). It was there laid down as the true principle that "the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by the statute, and that consequently when valuable property (that is property capable of yielding a net rent above what is required for its maintenance) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the Government of the country, and are therefore deemed to be part of the use and service of the Crown," *per* Lord Westbury, L.C. (at p. 504).

The application of the decision of the House of Lords in *The Mersey Docks Case* (1) to the Irish Poor Law Act, and the valuation statutes, came under the consideration of the Court of Queen's Bench in *The Guardians of the Londonderry Union* v. *The Londonderry Bridge Commissioners* (2). The defendants were in occupation of the tolls and toll-houses of the bridge, which was a public highway open to all Her Majesty's servants. The Court of Queen's Bench, applying the authority of *The Mersey Docks Case* (1) to the Irish statutes, held that the tolls and toll-houses were not dedicated to and used for public purposes. This decision was reversed by the majority of the Judges in the Court of Exchequer Chamber (I. R. 2 C. L. 577). "The true ground of the judgment was that a bridge open as of right to every member of the public on payment of a toll, which toll could only be used for the benefit of the public in connexion with the bridge

(1) 11 H. of L. Cases, 443. (2) I. R. 1 C. L. 283.

itself, and could never be the source of private profit, was dedicated to, or used for, public purposes. The fact that the bridge might, and probably would ultimately, become toll free, was a legitimate argument to show that the purpose of the user was wholly public, but in no other way was relevant to the decision" (*per* Holmes, L.J., *Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1)). The property of the Belfast Harbour Commissioners was held by this Court to be held exclusively for public purposes. There a large revenue was derived from harbour rates, storage, and other dues, producing a surplus which was to be applied in the improvement of the harbour: *Belfast Harbour Commissioners* v. *Commissioner of Valuation* (2).

A question identical with that involved in the *Belfast Harbour Case* (2) arose in *The Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1). This case was brought in order to obtain a decision of the Court of Appeal under 60 Vict. c. 17 upon the question raised in the cases to which I have referred. The Court adopted the view taken by the majority of the Court of Exchequer Chamber in *The Londonderry Bridge Case* (3), and of this Court in *The Belfast Harbour Case* (2), and held the property of the Harbour Commissioners to be held exclusively for public purposes.

In applying the principles laid down by those decisions to property held for educational purposes by schools, colleges, or universities, questions of difficulty arise. On this branch of the case a powerful argument was addressed to us by the Solicitor-General. He pointed out that the buildings of the college were not open to use by the public in the same sense as the Londonderry bridge or the harbour at Belfast. The public have no right of access to the library or other buildings of the college. The matriculated students are members of the Corporation, and he contended the use of the college for the benefit of a privileged class deprives it of the exclusively public character which is the condition of exemption under the Valuation Acts.

On the other side, it was pointed out that the college was established under the provisions of an Act of Parliament for

(1) [1899] 2 I. R. 214, at p. 228.
(2) [1897] 2 I. R. 516.
(3) I. R. 1 C. L. 283.

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purposes of great public utility; that it was open to all His Majesty's subjects without distinction of creed, class, or sex; that the public, by elected representatives, were admitted to a share in the government of the College; that the land and buildings were provided by public money, and it receives an annual grant out of moneys voted by Parliament. No doubt it derives what may be expected to be a large and increasing revenue from fees paid by students. But, as this revenue must be applied exclusively for the purposes of the College, it was rightly contended that its receipt is not inconsistent with the public nature of the building or its use for public purposes. The purposes for which the College is used are the education of students for the attainment of University degrees and other academic distinctions; the promotion of education, and the prosecution of literary and scientific research. These are purposes of great public utility; but to state, as a general proposition, that an institution established for their promotion, even if supported in part by public money, is exempted from rateability under the exemption in the Poor Law and Valuation Acts, would be to adopt a principle which in its practical application would have far-reaching consequences.

It is, in my opinion, impossible to lay down any general rule applicable to cases of educational institutions. Each case must be decided on a consideration of its particular facts. In *The Pembroke Urban District Council* v. *The Commissioner of Valuation* (1) the property of a branch school established under the Technical Instruction Acts, 1889-91, was held by this Court not to be rateable. The grounds of the decision are stated by the Lord Chief Justice, at p. 437, and may be thus summarized:—The fabric of the institution was constructed by means of public money; it is maintained by public money, supplemented by a Parliamentary grant; the Committee have no beneficial interest in the premises; the school is open to all; the teachers are paid out of public money; the institution serves a great public purpose of national and imperial interest. A trifling revenue was derived from a non-compulsory fee of 2*s.* 6*d.* per head paid by pupils, and expended for school purposes. These receipts were immaterial if

(1) [1904] 2 I. R. 429.

the school was dedicated to public purposes, and might fairly be regarded as negligible if it were regarded as a purely charitable institution.

The considerations by which this Court was led to decide that the Pembroke technical school was occupied and used for public purposes are generally applicable to University College, Cork. But there is in the case before us an additional element, which was absent in that case, and which appears to me to be of supreme importance. I have already noted section 7, sub-section (6), of the Universities Act of 1908, under which the accounts of the governing bodies of each of the new universities and of the constituent colleges are not only subject to audit by the Controller and Auditor-General, which might not in itself be conclusive, but must be periodically laid before the House of Commons. This I regard as a declaration by the Legislature that the revenues of the College are applicable exclusively to purposes of a public character.

The public funds devoted to the purposes of primary and secondary education in Ireland are also under Parliamentary control. The control of the House of Commons over the expenditure on primary education is direct, inasmuch as the funds by which that system is maintained are moneys annually voted by Parliament. The administration of the funds applied for the endowments of the Intermediate Education Board is also under Parliamentary control. A sum has recently been voted in aid of Intermediate education. But the permanent endowments of the Board are statutory, and outside the immediate control of Parliament. But the accounts of the Board are subject to public audit, and its rules must be laid before Parliament. This system of Parliamentary control established by the Legislature is, in my opinion, a recognition that the funds to which it is applicable must be applied exclusively to public purposes. The property of the Board is vested in the Board as a corporation; and it has always been properly treated as exempt from taxation, as being held for public purposes. By the system of audit and accounting to the House of Commons established by the statute, University College is placed in the position of a State institution. Similar provisions are not contained in the constitution of any university or university

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college with which I am acquainted. My decision does not rest on any principle generally applicable to institutions of this kind. The arguments which have been addressed to us, based on a consideration of the object for which this College was founded, and the purposes of public utility which it fulfils, afford good reasons why the Legislature, recognizing the relation which it bore to the public service, should have placed its management under the control of the House of Commons. Whether these considerations, if they stood by themselves would have sufficed to bring the College within the exemption in the Valuation Acts or Poor Law Acts, is a question which it is unnecessary to consider. For the reasons which I have stated, I am of opinion that the learned Recorder is correct, and that the question submitted to us ought to be answered in the affirmative.

KENNY, J.—

This case is one of some consequence, involving as it does, the question of exemption from rateability of educational establishments in Ireland such as the one which has given rise to the present proceedings, and, as we have been informed, directly affecting the liability to rates of the other constituent colleges of the National and Belfast Universities. It has also been stated that the position has assumed an acute form which did not exist in the case of University College, Cork, under its old name and constitution of the "Queen's College, Cork," inasmuch as though it was regarded as exempt, the Government made an annual payment to the rating authority equivalent to the amount which the College would have been obliged to pay if it had not been exempt. The payment in future of such a sum in respect of the College as now constituted is improbable, if not impossible. Therefore it becomes of importance to both the Corporation of the City of Cork, which is the rating authority, and to the College to have their legal position in respect to rates established.

The liability depends on the construction of the Irish Rating and Valuation Acts which have been the subject-matter of observation and decision in the numerous authorities in this country which have been cited in the course of the argument,

and which have received their most recent exposition in the judgment of this Court delivered by the Lord Chief Baron in the case of *Moore* v. *Boyd* (1) on the 9th inst. We there affirmed the proposition laid down in the judgment of Gibson, J., in *The Belfast Harbour Case* (2), and of Holmes, L.J., in *The Sligo Harbour Case* (3), that the Rating and Valuation Acts should be read in harmony, as one code, the Valuation Acts being treated as supplementary to the Rating Acts, and consequently that the exemptions from rates contained in them were identical in purpose and co-extensive in operation. These cases dealt with hereditaments that were alleged to be used for public purposes, but there can be no doubt that the same principle of construction applies in the instances where the user is claimed as being of a charitable nature: see the judgment of Gibson, J., in *The Belfast Harbour Commissioners Case* (2) and also his judgment in *Clancy's Case* (4). With the law so far established, two questions present themselves: the first, whether the foundation and purposes of the College are of an exclusively public or charitable nature; and the second, whether, if they be either public or charitable, the *user* of the lands and buildings of the College is exclusively public or charitable. If the foundation is altogether public or charitable and the user likewise, and no private profit or use is derived from the hereditaments, the latter are exempt from rates.

It is possible to regard the purposes of the college, as either public or charitable (Andrews, J., in *The Pembroke U.D.C. Case* (5), and Gibson, J., in *The Belfast Harbour Commissioners Case* (2)). I prefer to place them in the category of charitable, in which, in my opinion, they unquestionably are. After the decision of this Court in *Clancy's Case* (4) it could not be successfully contended that a great establishment for the advancement of education, such as this college, is not in its nature charitable, in the sense in which the word has been interpreted in *Pemsel's Case* (6). The judgments in *Clancy's Case* (4) in the most express terms adopt Lord Macnaghten's

(1) [1911] 2 I. R. 579.
(2) [1897] 2 I. R. at p. 536.
(3) [1899] 2 I. R. 214.
(4) [1911] 2 I. R., at p. 186.
(5) [1904] 2 I. R. 429.
(6) [1891] A. C. at p. 583.

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description in *Pemsel's Case* (1) of what is a legal charity —one of the divisions of which is "trusts for the advancement of education." It does not detract from its charitable character if it incidentally benefit the rich as well as the poor, or if the education be not gratuitous and the eleemosynary element be absent (Lord Macnaghten, in *Pemsel's Case* (1), and Gibson, J., in *Clancy's Case* (2) at p. 185). Furthermore, there can be no doubt that a foundation or institution is none the less charitable if its benefits should be confined to a particular place or a particular class. Such limitations could not deprive it of the thing which is its very essence, for it does not cease to be beneficent because the scene and scope of its operations are circumscribed. The institution we have to deal with is dedicated to the advancement of learning and education. The original charter of the Queen's College, shows it in terms—and the charters of the National University and of this constituent college, together with their statutes, leave no doubt on the subject. I may go further, and say that public education in this college, of the widest and most far-reaching character, is contemplated; and that while the benefits of the institution will probably be availed of most largely by persons in the south of Ireland, there is no restriction on the entrance within its walls of any other members of the community. This answers the first of the two questions which I regard as tests in the present case.

The other question is, whether the user of the hereditaments, as distinguished from the foundation of the institution, is exclusively charitable. If what the Rating Act calls, "any private profit or use" be directly derived therefrom—if the user be not altogether and exclusively charitable in its nature and purpose—it is not entitled to exemption. If the user be for partly charitable purposes and partly non-charitable, exemption cannot be claimed. The same principle of exclusive user, applies when the subject-matter is of a distinctly public character: see *The Londonderry Bridge Case* (3), *Belfast Harbour Case* (4), and *The Sligo Harbour Case* (5). Furthermore, if the revenue of the particular institution

(1) [1891] A. C., at p. 583.
(2) [1911] 2 I. R., at p. 185.
(3) I. R. 1 C. L. 283.
(4) [1897] 2 I. R. 516.
(5) [1899] 2 I. R. 214.

or any substantial part of it be *capable* of being diverted to a non-charitable use, although in practice it be applied to the general charitable purposes of the institution, the user could not be regarded as being for an exclusively charitable purpose. If the element of private profit or gain can co-exist with the charitable object, there cannot be immunity from rates under our Acts. The authorities in Ireland which involved this class of discussion are conversant with both public and charitable purposes. In *The Church Representative Body's Case* (1), the Church Representative Body were regarded as being in the category of Mercantile Communities carrying on a business for a non-charitable object and their premises were therefore held not to be of a "public nature" or used for "charitable purposes exclusively" within the meaning of the Rating Act, although in another sense they might be of a semi-public nature, and used for a quasi charitable purpose. *The Limerick Corporation Case* (2) is to the same effect, and so is *The Cemeteries Case* (3). In the latter the primary objects of the Committee were held not to be charitable, and their lands and premises were likened to the plant of a commercial or industrial undertaking, the profits of which were to be applied in charity, though not under any binding trust for that purpose. In such circumstances the user was held not to be exclusively charitable. Again, in *Clancy's Case* (4), while the original objects were held to be charitable, the fact that in the course of the user of the premises a substantial profit was derived from persons who were not within the charitable objects made the user, "not exclusively charitable." The Chief Baron in his judgment says that he "cannot distinguish this user from that of a club open to all—poor and rich—working men and all others. Such a user is not charitable."

Another class of case, and indeed the most important on this question of user, remains for observation. We have been much pressed with the contention that because under the charter and statute of the college the latter may demand and receive fees from those who avail themselves of its teaching, and who are

(1) I. R. 6 C. L. 561.
(2) I. R. 6 C. L. 420.
(3) [1897] 2 I. R. 157.
(4) [1911] 2 I. R. 173.

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themselves the very objects of the charitable purposes, that circumstance deprives the working of the institution of its "exclusively charitable" character, or divests it of its *prima facie* right to exemption, and *The Magee College Case* (1) and *The Waterford Union Case* (2) have been relied on in support of that proposition. In considering these cases it will be well to remember that under the charter and statute of University College, Cork, all moneys received on account of the college are to be paid into its banking account, and that the college is not to make any gift, division, or bonus in money unto or between any of its members. I entertain no doubt whatever that the fees of the students here form part of the revenue of the college, applicable for the promotion of its charitable purposes, and that the governing body are under a legally enforceable obligation to so apply those fees. There could be no basis whatever for the argument that a penny of those fees could be legally diverted to any purpose save that for which the college was established, namely, the advancement of education. No discretion is vested in the governing body as to their application outside of the particular charitable object, and an attempt at such an application would be a gross breach of trust, and could be immediately restrained by injunction of the High Court. Neither could there be a suggestion of a "private profit" to the governing body, or the members of the college, or of the institution being, or being analogous to, a trading or mercantile association. Where the circumstances of the authorities I have referred to are contrasted with those in the present case, they will be found to differ in one fundamental respect—namely the absence of any legal obligation to apply the fees to the charitable purposes of the institution. In *The Magee College Case* (1) the fees were payable—not to the college—but to the Professors—and were not affected by any charitable trust. This distinction is pointed out by the Lord Chief Baron, in *The Waterford Guardians Case* (2). In that case certain pupils were received into an institution primarily charitable on payment of fees of £50 a year each, and this circumstance was held to deprive the institution of its right to exemption. But

(1) I. R. 4 C. L. 438. (2) [1896] 2 I. R 538, at p. 554.

why? Because it did not appear that there was a legal obligation on the managers to apply those fees for the general charitable purposes of the institution. The Chief Baron in his judgment in that case guards himself against expressing an opinion that, if such a legal obligation did exist, the exemption from rates would apply. I would gather from the judgment of Andrews, J., that he based his opinion on the absence of the legal obligation, and that, if such obligation did exist, he would have regarded the user as exclusively charitable. This view is confirmed by his judgment in the *Pembroke Commissioners' Case* (1). Whatever doubt (if any) the Lord Chief Baron then felt appears to have been since removed (as appears from his judgment in *Clancy's Case* (2)); and the observation of the Lord Chief Justices at p. 440 of the report of the *Pembroke Commissioners' Case* (1) seems to have been amply justified. This latter case is an illustration of a "public" or "charitable" committee (one for technical instruction) receiving fees from its pupils, which fees under the scheme of technical instruction were legally dedicated to the maintenance of the committees' schools. The legal obligation to so apply them enabled the Court to hold that the schools were within the exemption.

The Pembroke Commissioners' Case (1) is an important one in another aspect. Holmes, L.J. (then Holmes, J.), in *The Cemeteries Case* (3), at p. 171), seems to have been of opinion that, assuming an original charitable foundation, it made no difference whether the surplus profits in that case were impressed with a charitable trust or not—and his *dictum* was pointedly referred to, and relied on in the argument in *Clancy's Case* (2). I cannot, however, find any allusion to it in either of the judgments of the Lord Chief Baron or Gibson, J., in this latter case, and I must only conclude that they either regarded it merely as an *obiter dictum*, or considered that they were not bound by it.

Being therefore satisfied that this college is in its objects, purposes and user "exclusively charitable" within the meaning of the rating and Valuation Acts, I hold that its lands and premises should be deemed exempt from assessment.

(1) [1904] 2 I. R. 429.
(2) [1911] 2 I. R., at pp. 181–182.
(3) [1897] 2 I. R. 157.

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WRIGHT, J. :—

The Queen's College, Cork, was, as is stated in the case stated by the learned Recorder, with other Colleges, established pursuant to the statute 8 & 9 Vict. c. 66. It was founded "for the better advancement of learning among all classes of Her Majesty's subjects in Ireland" (according to the recital in the preamble), and an annual sum not exceeding £7000 was made payable by the Treasury out of the Consolidated Fund to defray the educational purposes of the College, namely, payment of stipends and salaries to the officials, professors, and servants, and the expenses of prizes and exhibitions awarded for the encouragement and reward of students in the College. The College was bound to report its proceedings annually to Her Majesty, and a copy of such annual report was directed to be laid before Parliament. By a previous section it had been enacted that detailed accounts of, *inter alia*, their expenditure should be kept by the Commissioners of Public Works, in whom were vested the College buildings and premises, and that such accounts should be laid annually before Parliament.

By the Irish Universities Act, 1908 (8 Edw. 7, c. 38), which repealed in its entirety the Act of the 8 & 9 Vict. c. 66, Queen's College, Cork, under its new name of University College, Cork, became one of the constituent Colleges of the National University in Dublin. Provision is made for payment to it annually out of moneys provided by Parliament of a sum specified in the schedule to the Act, accounts of its receipts and expenditure are to be annually transmitted for audit and report to the Controller and Auditor-General, and these accounts and the reports thereon are to be laid before the House of Commons. By charter of His late Majesty, King Edward VII, dated 2nd December, 1908, it is declared that the college (University College, Cork) may demand and receive such fees as the governing body of the college may appoint, and this is followed by a somewhat unusual provision to the effect that, subject to the exceptions in the charter, the college shall not make any gift, division, or bonus in money unto or between any of its members.

By the statute for University College, Cork, duly made by the

Commissioners under the Irish Universities Act, 1908, and dated 15th May, 1911, it is enacted (chapter 27) that the governing body may appoint such fees as it deems fit to be paid by the students of the College. The earlier statute, 8 & 9 Vict. c. 66, authorized the professors, on behalf of the college, to take fees from the students in addition to their stipends (section 13). The fees so received, as I interpret the several statutes and charters, do not go to the professors, they are not ear-marked for any particular purpose, they go into the coffers of the college as portion of its revenue, earned by its own working, and must, like the rest of its revenue, be applied to the educational purposes of the college.

The main, I might almost say the only, question argued before us was, that this power to take fees, this earning capacity, deprived the college buildings of the character claimed for them of being exclusively used for charitable or public purposes. A great many cases have been cited in argument, with some of which I think it unnecessary to deal, but others call for careful examination.

We are precluded from considering whether *The Londonderry Bridge Case* (1) was rightly decided, more particularly having regard to the decision by the Court of Appeal of *The Sligo Harbour Commissioners' Case* (2). The decision in the former case is put by all the Judges who formed the majority of the Court on the ground that in the result a public highway was opened for all Her Majesty's subjects. Mr. Justice O'Hagan, as he then was, while admitting (p. 591) that the claim to exemption could not be sustained before an English tribunal, having regard to the decision in *Jones* v. *The Mersey Docks Trustees* (3) bases his judgment on the ground that the bridge was a public work created solely for the public benefit, from which there was to be no levy save for the expenses of making and maintenance, and which was to be devoted, not to the use of any district or of any class, but of "all Her Majesty's subjects" without exception (p. 584); and the judgments of FitzGerald, B., and Monahan, C.J., are based upon the same principle.

This case was followed, thirty years afterwards, by the Court

(1) I. R. 2 C. L. 577.
(2) [1899] 2 I. R. 214.
(3) 11 H. L. C. 443.

K. B. Div. 1911.

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of Appeal in the case of *The Commissioner of Valuation* v. *Sligo Harbour Commissioners* (1), the Court holding, as I read their reported judgments, that they were not at liberty to overrule *The Londonderry Bridge Case* (2), and by a majority approving of that decision. Public purposes and an occupation for the public service are not confined, in Ireland, to Government or State purposes, and it was there held, following *The Londonderry Bridge Case* (2) that the receipt of tolls by the Sligo Harbour Commissioners was not a private profit or use derived by them from the Sligo Harbour; that the property was dedicated to or used for public purposes, and was within the exemption of the Valuation Acts. This is the law in Ireland binding upon us.

The next case to which I wish to refer is the case of *The Trustees of the Magee College* v. *The Commissioner of Valuation* (3). The facts appear to be as follows:—The Magee College was founded and endowed by a testatrix for the education of young men in preparation for the Christian ministry in connexion with the Presbyterian Church. A system of the highest education was provided at a very moderate cost, part of the funds being devoted to providing bursaries for students. The salaries of the Professors were fixed at a certain sum in addition to fees paid by the pupils, and the college enjoyed the benefit of several acres of land purchased by its trustees. Exemption from rating was claimed on the ground that the building was used exclusively for charitable purposes. The Court held that it was not an exclusively charitable institution, and therefore not exempted from rating within the meaning of the Valuation Acts: see judgment of Whiteside, C.J., at p. 457:—"It seems to me to be an establishment on a cheaper scale, perhaps, than other colleges, where a system of the very highest education is provided, and that for the middle classes of society, who are, of course, to pay their teachers and professors for the valuable instruction afforded. Such an institution may be well expected to return a large income earned within its walls by the Professors"; and at p. 458 he shortly summarizes his conclusions as follows:—"I think there is a beneficial use of these premises; I

(1) [1899] 2 I. R. 214.
(2) I. R. 2 C. L. 577.
(3) I. R. 4 C. L. 438.

think there is a profitable return from the lands; the Professors receive their fees." Mr. Justice O'Brien, in concurring, bases his conclusion that the claim for exemption could not be sustained on the fact of the payment of fees by the students (p. 464), and Mr. Justice George (at p. 467) decides on the same ground, namely, that the payment of fees by the scholars to the professors was a profit earned by the institution. Great reliance is placed, it will be observed, by the several members of the Court on the case of *The Queen* v. *Sterry* (1). The institution in that case was for maintaining and educating the poor children of the Society of Friends. It was held that the premises were not used exclusively for charitable purposes, on the ground that by the rules of the institution a sum of £12 yearly had to be paid towards the expense of each child admitted. This sum, £12, was admittedly insufficient to meet the actual expenses of the child; but Lord Denman, C.J., in delivering the judgment of the Court, said—"This sum, it is true, is not adequate to the expense, and, in a popular sense, does not make the occupation of the premises beneficial, *i.e.* gainful, but still it is a revenue which the building produces; and actual gain on a balance of profit and loss is not needful; it is enough if a revenue be produced." In the most recent case in this country, *Clancy* v. *Commissioners of Valuation* (2), Mr. Justice Gibson says (p. 189) that this case (*R.* v. *Sterry* (1)) was based on the exploded view that rateability depended on beneficial occupation. It was suggested in argument that *The Magee College Case* (1) was wrongly decided, but I cannot find a doubt thrown on the correctness of the decision in any of the subsequent Irish cases, in many, if not in all, of which it is cited, and in particular the judgment of Mr. Justice O'Brien is more than once quoted.

In the case of *The Guardians of the Waterford Union* v. *Barton* (3) it was decided that the College was not used exclusively for charitable or public purposes, because some few pupils, known as "extern pupils," were admitted at a fee of £50 each, these fees being applied for their maintenance, and any surplus carried to the credit of the Commissioners of National

(1) 12 A. & E. 84.
(2) [1911] 2 I. R. 173.
(3) [1896] 2 I. R. 538.

K. B. Div. 1911.

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Education, but it was expressly found by the Court that there was no obligation on the part of the College to so apply such surplus, and the Chief Baron declined to express any opinion as to what the result would have been if there was an obligation on the managers of the college to bring to the credit of the National Board the profit, if any, derived from these paying pupils: see judgment of Palles, C.B., at p. 558, and of Andrews, J., at p. 557. The decision in that case, and the question of exemption of buildings used for public purposes was further considered by this Court in the case of *The Pembroke Urban District Council* v. *The Commissioner of Valuation* (1), in which the question was the claim for exemption from taxation of the Pembroke technical school.

In that case the claim was resisted on the ground that a small fee of 2*s.* 6*d.* per head was charged to the pupils. The Court held on the special facts of the case that this trivial fee was not a charge for instruction, and that the amount so levied was expended in providing fire and light for the school and cleaning the school windows; but further, they all find that there was an obligation to apply these fees for the benefit of the institution, and that this fact distinguishes the case from *The Waterford Union* v. *Barton* (2), and *The Magee College Case* (3) (*vide* judgment of the L.C.J., at p. 438, of Andrews, J., at p. 443, and of Gibson, J., at p. 444), and in the result the decision of the Court was that the school was dedicated to or used for public purposes, and was entitled to exemption under the Valuation Acts.

Let me shortly recapitulate the main facts as to the constitution and character of University College, Cork. It is a college created by public statute and Royal charter, dedicated to a public purpose, if ever there was one to which that phrase could be rightly applied, namely, the advancement of learning in Ireland among all classes, it is a non-sectarian college open to all classes, unlike the Friends' School in *Sterry's Case* (4), and the Presbyterian college in *The Magee College Case* (3), its revenue is partly public money, and partly fees earned by itself as a public teaching and training institution; and both kinds of revenue are unalterably

(1) [1904] 2 I. R. 429.
(2) [1896] 2 I. R. 538.
(3) I. R. 4 C. L. 438.
(4) 12 A. & E. 84.

devoted to the purposes of the College, and accounts of its annual receipts and expenditure must be laid before Parliament. On these facts, and in accordance with decided cases, and particularly with the decision of this Court in *The Pembroke Technical School Case* (1), I am of opinion that the buildings and premises of University College, Cork, are altogether of a public nature, and used for public purposes, within the meaning of the 15 & 16 Vict. c. 63, sect. 16, and 17 & 18 Vict. c. 8, sect. 2, and accordingly are entitled to exemption under those Acts. I am far from saying that they may not also be exempt, as being used exclusively for charitable purposes, giving to the word "charitable" the meaning put on it in the judgment of Palles, C.B., in *The Waterford Case* (2), but I prefer to base my decision on the other ground, namely, that they are altogether of a public nature and used for public purposes.

Solicitor for appellants: *Michael Murphy.*
Solicitor for respondent: *W. G. Towers.*

J. M.

MURPHY *v.* BANDON CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED.

Appeal. 1909. Oct. 29.

Landlord and tenant—Lease—Exclusion of implied by express covenant.

APPEAL by the defendants from the decision of the King's Bench Division ([1909] 2 I. R. 570), where the facts are fully stated, and the material parts of the lease given.

A. M. Sullivan, K.C., and *George M'Sweeney*, for the appellants.
Conner, K.C., and *Norwood*, for the respondent.

The Court of Appeal (MEREDITH, M.R., PALLES, C.B., and HOLMES, L.J.), affirmed the decision of the King's Bench Division, and dismissed the appeal with costs.

Solicitor for the appellants: *T. J. O'Driscoll.*
Solicitor for the respondent: *Thomas Scanlan.*

R. ST. J. C.

(1) [1904] 2 I. R. 429. (2) [1896] 2 I. R. at pp. 546-47.

Appeal.
1910.
July 28.

McGILLICUDDY *v.* CASSIDY (1).

Practice—Action to recover possession of land—Overholding—Weekly tenancy—Notice to quit—Motion for final judgment—Specially indorsed writ—Orders III, Rule 6, and XIV. R. 1.

Motion for final judgment granted on a specially indorsed writ to recover possession of premises held under a weekly tenancy which had been determined by notice to quit.

APPEAL by the defendant from an order of Ross, J., sitting for the King's Bench Division, granting the plaintiff's motion for final judgment. The action was brought to recover possession of premises at No. 8 Manor Street, Dublin, which had been held by the defendant from the plaintiff under a weekly tenancy. Notice to quit determining the tenancy had been duly served, and had expired. The writ of summons was specially indorsed under Order III, Rule 6.

Bartley, for the appellant:—

Order III does not apply to a tenancy of this kind. In *Arden* v. *Boyce* (2) it was held by the Court of Appeal in England that the corresponding English Order only applied to cases coming within 1 Geo. 4, c. 87, sect. 1, and the English Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), sect. 213. Weekly tenancies would certainly not fall within the provisions of either of those enactments: *Arden* v. *Boyce* (2) was followed in this Court in *Gleeson* v. *Keown* (3). In *O'Sullivan* v. *Ambrose* (4) it was held that section 52 of the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154), did not apply to tenancies less than tenancies from year to year.

Peart, for the respondent, was not called on.

(1) Before THE LORD CHANCELLOR and LORD JUSTICE CHERRY.
(2) [1894] 1 Q. B. 796.
(3) 32 Ir. L. T. R. 150.
(4) 32 L. R. Ir. 102.

THE LORD CHANCELLOR :—

Appeal. 1910.

McGILLICUDDY v. CASSIDY.

The cases of *Arden* v. *Boyce* (1) and *Gleeson* v. *Keown* (2) were ejectments based on forfeitures. We have often held that weekly tenancies were within Order III, Rule 6. [His Lordship cited from the Registrar's book *M'Donnell* v. *Kavanagh* (May, 1904), and *Bannon* v. *M'Intyre* (October, 1908).]

The appeal must be dismissed with costs.

CHERRY, L.J., concurred.

Solicitors for the appellant: *M. Hanmore & Co.*
Solicitors for the respondent: *J. H. Walsh & Co.*

R. ST. J. C.

CLIFFORD *v.* PIGGOTT (1).

Appeal. 1909.

Nov. 1, 2.

County Court—Practice—Interpleader—Civil bill by a third party claiming goods taken in execution—Time within which such proceedings must be taken—14 *&* 15 *Vict.* c. 57, *s.* 150.

In interpleader proceedings, under 14 & 15 Vict. c. 57, s. 150, brought against an execution creditor by a person claiming as his property goods taken under a decree of a civil-bill Court, the claimant's civil bill against the execution creditor must be returnable to the first place where Quarter Sessions are held in the division where the goods were seized, and for which the civil bill can be served in due time, after the date when the affidavit and money mentioned in sect. 150 of that Act have been lodged with the sheriff by the claimant.

APPEAL by the plaintiff from the judgment of the King's Bench Division reported [1909] 2 I. R. 589, where the facts are fully stated.

A. M. Sullivan, K.C., and *M. Comyn*, for the appellant.

P. D. Fleming, K.C., and *Bernard Roche*, for the respondent.

(1) [1894] 1 Q. B. 796. (2) 32 Ir. L. T. R. 150.

(1) Before THE LORD CHANCELLOR, THE LORD CHIEF BARON, and LORD JUSTICE HOLMES.

Appeal.
1909.

CLIFFORD
v.
PIGGOTT.

Nov. 2.

THE LORD CHANCELLOR :—

The question in this case turns on sect. 150 of the Civil Bill Act of 1851. One of the objects of the section is to expedite business. What is the meaning of the word "sessions" in the section ? I think it has two meanings. It is capable of meaning either "sittings" or Quarter Sessions. We all think, on the construction of the Act, and on the decision in *The Queen* (*Farquharson*) v. *Chairman and Justices of Antrim* (1), that the decision of the King's Bench in this case was right. The 31st and 32nd sections of the Act are very important. They were fully considered in *Farquharson's Case* (1). The same elements exist in the present case as were in *Farquharson's Case* (1). In *Legge* v. *Neill* (2) the same view of the practice was adopted. *Farquharson's Case* (1) is half a century old and was decided by very eminent Judges. It is consistent with convenience and with the true interpretation of the Act.

PALLES, C.B., and HOLMES, L.J., concurred.

Solicitor for the appellant : *John O'Connell.*
Solicitor for the respondent : *Maurice M'Cartie.*

R. ST. J. C.

(1) 8 Ir. Jur. (N. S.) 47. (2) 25 Ir. L. T. R. 20.

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Evidence of user—"Assisting in conducting the business of any house so used."] *M. M.*, with the assistance of her brother *P.*, kept a shop, nominally for the sale of chandlery, tobacco, and stationery. The police observed that on days when the newspapers announced that horse races would take place, numbers of persons visited the shop, including a man known to the police to be a bookmaker's "tout," who, on such days, was obeerved to visit the shop several times in the day. On making a raid the police found *M. M.* behind the counter, and three men in the shop, one of whom was writing out a betting docket on the counter. Two other betting dockets were found on the floor beside another of the men, and *M. M.* was observed to crush up and throw behind the counter two slips of paper which were found to be betting dockets, one being signed "Tom." Betting newspapers were found on the counter, and betting literature behind the counter and in the back parlour. *M. M.* was charged with using the shop for the purpose of betting with persons resorting thereto, and *P.* with "assisting in the conduct and management of the shop." The only evidence against *P.* was a statement that he "assisted *M. M.* in the shop," made by the prosecutor in giving evidence before the magistrate. Both *M. M.* and *P.* were convicted and fined. *Held*, that the shop presented all the *indicia* of a "betting establishment," and that, on the evidence, the magistrate was justified in convicting in both cases. *Maguires, Appellants; Quinn, Respondent* - - - K. B. 216

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CERTIORARI—*Civil bill decree—Appeal pending—Practice.*] The Court will issue a *certiorari* to bring up a civil bill decree notwithstanding that notice of appeal from the decree has been served on the plaintiff and lodged. *O'Reilly* v. *Coyle* (37 Ir. L. T. R. 10) followed. *Scott* v. *Hyland* [K. B. 54

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CHARTER PARTY—*Strike clause, effect of—"Workmen essential to the discharge of the cargo," meaning of—"Loading" and "discharge"—Demurrage.*] A charter party contained a "strike" clause providing that "If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days of discharging shall not count during the continuance of such strike or lock-out." On the arrival of the ship at the port of discharge, a strike of carters was in existence, in consequence of which the docks had become congested; this condition of affairs rendered it impossible for the consignee to accept delivery of the cargo, there being neither space for the cargo in the docks, nor means of taking it away when tendered over the ship's rail. *Held*, that the carters in these circumstances were not a "class of workmen essential to the discharge" within the meaning of the clause. *Held*, also, that "discharge" is a joint act, necessitating co-operation on the part of the ship and the receiver of the cargo, and that the obligation of the ship under this term is fulfilled when its crew or its stevedore's men are in a position to offer, and do offer, delivery to the consignee over the ship's side. *Langham Steamship Company* v. *Gallagher* - - - - - K. B. 348

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CLERK OF THE PEACE—*Local Government—Expenses incurred by Clerk of the Peace in printing and advertising for "county purposes"—"County purposes" in section 142 of the Grand Jury Act* (6 & 7 *Wm.* 4, *c.* 116)—*Liability of County Council to provide for printing and advertising for "county purposes"* (6 & 7 *Wm.* 4, *c.* 116,

CLERK OF THE PEACE—*continued.*

s. 142; 40 & 41 *Vict. c.* 56, *s.* 20, *sub-s.* 3).] The expenses incurred by the Clerk of the Peace in (1) printing lists of Quarter Sessions; (2) advertising dates of Quarter Sessions; (3) printing licensing applications; (4) advertising appointments of civil-bill officers; (5) advertising of applications for compensation for criminal injuries; and (6) printing lists of civil-bill appeals to the Judges of Assize, are in the nature of expenses for county purposes, the presentment for and payment of which by the Grand Jury were lawful, but not compulsory, under section 142 of the Grand Jury Act, 1836 (6 & 7 Wm. 4, c. 116), and, as the third sub-section of section 20 of the County Officers and Courts (Ireland) Act, 1877, only empowered the continuance of presentments for, and payments of, such expenses, but did not render them compulsory, there is now no legal obligation on the County Council to make provision for their payment, although it is competent and proper for them to do so. Judgment of King's Bench Division (*ante*, p. 154) reversed. *The King* (*Cloherty*) v. *Galway County Council* - K. B. 154; App. 474

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—— Tied public-house — Breach of — Town Tenants Act, 1905, ss. 5, 6, 7 450, 455
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—— opposition to Bill in Parliament—Special fees to county surveyor as expert witness—Taxation by officer of House of Commons allowing—Surcharge by Local Government Board auditor - - 535
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—— Repair of alleged public road—Evidence—Burden of proof - - - 573
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COUNTY COURT — *Practice — Interpleader — Civil bill by a third party claiming goods taken in execution—Time within which such proceedings must be taken*—14 & 15 *Vict. c.* 57, *s.* 150.] In interpleader proceedings, under 14 & 15 Vict. c. 57, s. 150, brought against an execution creditor by a person claiming as his property goods taken under a decree of a civil-bill Court, the claimant's civil bill against the execution creditor must be returnable to the first place where Quarter Sessions are held in the division where the goods were seized, and for which the civil bill can be served in due time, after the date when the affidavit and money mentioned in sect. 150 of that Act have been lodged with the sheriff by the claimant. *Clifford* v. *Piggott* - - - - - - App. 633

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—— Hearsay—Statements made by deceased as to injuries - - - - - - 301
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EXPERT EVIDENCE — County Surveyor — Special fees—Allowance of - 535
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FORESHORE — *Alluvion—Accretions caused by the recession of the line of ordinary high water—When owner of the lands adjoining is entitled to such accretions — Test — "Gradual and imperceptible accretions caused by the action of natural causes."*] The decision of the House of Lords in *Gifford* v. *Yarborough* (2 Bligh N. S. 137) conclusively determines that where land is added to the seashore by the gradual and imperceptible action of natural causes, the owner of the lands adjoining the accretions acquires in them a good title against the Crown, notwithstanding the existence of marks or bounds or other evidence by which the former, or a former, line of ordinary high water can be ascertained. The real question in every such case of accretion is whether during the process of accretion the progress of the accretion can be ascertained. *Attorney-General* v. *M'Carthy* - - - - - - K.B. 260

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HUSBAND AND WIFE—*Tort—Money wrongfully appropriated—Ratification of wrongful act by true owner—Money applied by the tortfeasor in discharging liabilities of her husband*—Assumpsit—*Money had and received—Liability of the estate of deceased husband to refund the money taken.*] A volunteer receiving money, belonging to another, from a person who has obtained such money by a wrongful act, made rightful by imputed consent, resulting retrospectively from such ratification, cannot hold the money as against the true owner. Such volunteer is liable, like the person from whom he obtained the money, and cannot be in a better position than he would have been had the person through whom the money was obtained been the agent of the true owner to apply the money to a specific purpose, other than that of giving it to such volunteer. *A.*, a married woman, having misappropriated a deposit receipt for £100, belonging to her father, cashed the same with a trader to whom her husband was indebted, obtaining therefor the sum of £111 0*s.* 1*d.*, the proceeds of the deposit receipt with interest. In an action, instituted by the executors of *A.*'s father against *A.* as administratrix of her deceased husband, and also in her personal capacity, to recover the said sum of £111 0*s.* 1*d.*, evidence was given that, on the discovery by *A.*'s father of the loss of the deposit receipt, *A.* had told her father she had taken it, and that the money would be put back, upon which information *A.*'s father ceased to treat the appropriation of the deposit receipt by *A.* as a theft. Evidence was also given by one of the plaintiffs that *A.* and her husband had given a promissory note to repay the amount of the deposit receipt, but at the trial of the action no such note was produced, and it was alleged that this note had been taken from *A.*'s father a few days before his death. It was admitted that *A.* had applied the proceeds of the deposit receipt in discharging liabilities of her husband as his agent. The jury having found that the deposit receipt had been wrongfully appropriated by *A.*, judgment was entered for £111 0*s.* 1*d.* against *A.* as administratrix of her deceased husband and in her personal capacity. No other question was asked to be submitted to the jury. On a motion to set aside the judgment as against *A.* as administratrix, *Held*, that it must be inferred that *A.*'s father had ratified the appropriation by *A.* of the deposit

HUSBAND AND WIFE—*continued.*
receipt, and the conversion by her of the same into cash, and also, that *A.*'s husband adopted the acts of his wife as his agent, and that upon such inferences and upon the admissions, the proceeds of the deposit receipt being in the hands of *A.* as money received by her to the use of her father, the husband, during his lifetime, would have been liable to an action for money had and received to the use of her father, and, therefore, judgment should be against the defendant *A.* as administratrix of her husband as well as in her personal capacity. *Lyons* v. *O'Brien* - - K. B. 539

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INHABITANT HOUSEHOLDER—Artizans' dwellings—Rates—*Bona fide* payment
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—— Part of house during part of qualifying period and the whole house during residue occupied—Whether a case of successive occupation - - - - - 313
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INJURY TO PASSENGER—Negligence—Tramcar - - - - - 224
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INJURY TO WORKMAN—Accident causing death—Evidence - - - 301
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—— Solicitor's lien - - - - - 118
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JURISDICTION—County Court—Winding-up of building society - - - 553
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—— Estates Commissioners.
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—— King's Bench Division—*Certiorari*—Decision of Local Government Auditor as to costs of County Council - - - 535
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—— King's Bench Division (Probate)—Condemnation of alleged will on motion - 36
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—— Local Government Board—Appeal under Old Age Pension Act - - - 331
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—— Local Government Board—Claim for pension—Age of claimant—Decision of local pension committee - - 88, 578
See PENSION. 2.

—— Service out of.
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JURY—*Revision—Jurors' Qualification (Ireland) Act*, 1876 (39 & 40 *Vict. c.* 21, *s.* 2)—*Tenant-purchasers—Freeholders in occupation of qualifying lands — Qualification — "Clear income of £10 by the year"—Mode of ascertaining "clear income."*] A freeholder, having in his own name or in trust for him a clear income of £10 by the year, in lands and tenements of a freehold tenure, is qualified by the Jurors' Qualification (Ireland) Act, 1876 (39 & 40 Vict. c. 21), sect. 2, sub-sect. 1, as a juror for the county in which they are situate, if he resides therein; and tenant-purchasers and other freeholders are not disqualified if, having such clear income, they are in occupation of qualifying lands rated at less than the net annual value fixed for the county where such lands are situate under the first schedule of the Act. The manner in which the "clear income" of freeholders in occupation of qualifying lands should be estimated or ascertained, considered. In estimating the clear income of a tenant-purchaser two main elements should be considered—(1) the value of the lands, and (2) the amount of the purchase-annuity payable by the tenant-purchaser. *The King (Attorney-General)* v. *Craig* - - - - K. B. 38

JUSTICES—*Jurisdiction—Service of summons—Last or usual place of abode—Non-appearance—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *sect.* 12 (3) *and sect.* 20 (2).] The house where a defendant lodged for a period of six weeks while temporarily employed on work therein is not "his last or more usual place of abode" within the meaning of these words as contained in section 12 (3) of 14 & 15 Vict. c. 93, and to leave a copy of a summons at such a house two days after

JUSTICES—*continued.*
the defendant has ceased to reside there is not "sufficient" service within the meaning of the said sub-section, nor is such a summons "duly served" within the meaning of section 20 (2) of said Act. *The King (Regan)* v. *Justices of Co. Cork* [K.B. 258

—— Petty Sessions clerk — Appointment of — Place of meeting — Qualification of Justices taking part in - - 382
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—— Renewal of certificate for spirit grocer's licence — Omission to serve notice on police—Annual licensing sessions—Power to grant certificate at ordinary sessions—Adjournment - - - - - 393
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LAND LAW (IRELAND) ACTS—*Landlord and tenant—Land purchase—Irish Land Act*, 1903 (3 *Edw.* 7, *c.* 37), *s.* 98—*Estates Commissioners—Lands fit to be regarded as a separate estate—Judicial determination—Duty of Estates Commissioners—Natural justice—Hearing owner—Mandamus.*] The determination of the Estates Commissioners whether lands, in respect of which an originating application for sale has been lodged with the Irish Land Commission, are or are not fit to be regarded as an "estate" for the purposes of the Irish Land Act of 1903 (3 Edw. 7, c. 37), is a judicial determination. Where the Estates Commissioners, without affording the owner the opportunity of a hearing, dismissed an originating application, endorsing thereon an order that the lands therein were not fit to be regarded as an estate for the purposes of the Irish Land Act of 1903: *Held*, by Madden, J., and Wright, J. (Lord O'Brien, L.C.J., dissenting), that the order of the Estates Commissioners was invalid, the refusal to hear the owner not being in accordance with the principles of natural justice, and that a mandamus should issue directing the Estates Commissioners to afford a hearing to the owner. *Semble, per* Madden, J. When the refusal to declare lands an "estate" is founded on a conclusion of law, the Estates Commissioners are under a statutory obligation to state the grounds of their refusal, so that the interested parties may have an opportunity of exercising their right to have a question of law referred to the Judicial Commissioner under sect. 23 of the Irish Land Act, 1903 (3 Edw. 7, c. 37). *The King (Vaugh and Hosie)* v. *Estates Commissioners* - K.B. 11

—— Joint purchasers—Vesting order—£5 freehold franchise—4 Geo. 4, c. 36, s. 1
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—— Urban District Council—Artizans' dwellings—Verbal letting—Rates—*Bona fide* payment—Franchise - - - 190
See PARLIAMENT. 3.

LEASE—*Landlord and tenant — Overholding — Lease for lives and term of years to commence from the death of the last surviving* cestui que vie—7 *Wm.* 3, *c.* 8 (*Ir.*), *ss.* 1, 3—"*Elsewhere absent themselves in this realm by the space of seven years*"—*Evidence—Burden of proof.*] By lease dated in 1822 premises in the town of Bandon were demised to *C.* of Bandon for the lives of *D.*, her son, aged eleven, *A.*, and *R.*, son of *F.* of Bandon, aged nine, and twenty-one years from the death of the survivor. *C.*'s interest in the lease vested in the defendant, an auctioneer, who sold the reversion to the plaintiffs under particulars stating that *A.* was the last life in the lease, and died on 5th February, 1888, and a civil bill ejectment for overholding was brought after February, 1909. On an appeal from a dismiss by the County Court Judge a case was stated by the Judge of Assize. It appeared that *A.* died on the date stated, but the only other evidence of the expiration of the lease was the evidence of the plaintiffs' foreman, who was born in 1852, and had resided for over forty years in Bandon, and knew the town thoroughly. He merely proved that he never heard of either *D.* or *R.* (the two other *cestuis que vie*), "though he had made every inquiry he could." After the 5th February, 1909, the plaintiffs served notice on the sub-tenants to pay their rents to the plaintiffs, and the defendant served a claim for compensation under the Town Tenants Act. *Held*, by Lord O'Brien, L.C.J., in the King's Bench Division, and by the Lord Chancellor and Holmes, L.J. (Palles, C.B., dissenting), in the Court of Appeal, that the statute 7 Wm. 3, c. 8 (Ir.), s. 1, applied to such a lease. *Held*, by Palles. C.B., that the impossibility of applying the remedy provided by section 3 to all cases of wrongful evictions of such a lease under the Act showed that section 1 was inapplicable. *Held*, also, by the Lord Chancellor, Lord O'Brien, L.C.J., and Holmes, L.J., that the evidence on behalf of

LEASE—*continued.*
the plaintiffs was sufficient to entitle them, under the statute, to a decree for possession, in the absence of evidence on the part of defendant that *D.* and *R.*, or either of them, survived *A.* (Gibson, J., dissenting in the King's Bench Division). *Held*, by Lord O'Brien, L.C.J., and Boyd, J., that, independently of the statute, the evidence was sufficient to raise the common law presumption that *D.* and *R.* died more than twenty-one years before the action was brought. *Allman & Co.* v. *M'Cabe* - - - K.B. 398; APP. 419

—— Implied covenant—Exclusion by express 631
See COVENANT.

LICENSING ACTS — *Licensing Act*, 1902 (2 *Edw.* 7, *c.* 18), *section* 2, *sub-sect.* 1—"*Licence*"—"*Licensed premises*"—*Distributive construction—Wine and beer dealer's licence—Application for publican's licence.*] The exception in sub-section 1 of section 2 of 2 Edw. 7, c. 18, was intended to preserve existing interests, and is to be construed distributively. It does not entitle the holder of one kind of licence to obtain another of a different nature, *e.g.* the holder of a wine and beer dealer's licence to obtain a publican's licence. *The King* (*Collins*) v. *The Chairman and Justices of County Donegal* ([1903] 2 I.R. 533) and *Rex* (*Dorrian*) v. *Greer* (3 New Irish Jurist, 302) approved of. *The King* (*Henderson*) v. *Chairman and Justices of Co. Louth* - - - - - APP. 312

2. —— *Spirit grocer's licence — Renewal certificate—Beer Retailers' and Spirit Grocers' Retail Licences* (*Ireland*) *Act*, 1900 (63 & 64 *Vict. c.* 30, *sections* 1 *and* 2)—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94, *sect.* 82)—*Application for Justices' certificate at annual licensing sessions—Failure to serve notice of application on police twenty-one days before the annual licensing sessions — Beerhouses* (*Ireland*) *Act*, 1864 (27 & 28 *Vict. c.* 35, *sect.* 4)—*Adjournment of application to next Petty Sessions—Licensing Act* (*Ireland*), 1874 (37 & 38 *Vict. c.* 69, *sect.* 12, *sub-sect.* 2; *sect.* 37)—*Service of notice on police twenty-one days before the adjourned hearing.*] Section 2 of the Beer Retailers' and Spirit Grocers' Retail Licences (Ireland) Act, 1900, requiring certificates to be granted by Justices in respect of spirit grocers' licences at the annual licensing sessions only, applies only to certificates in respect to new licences, as defined by section 37 of the Licensing Act (Ireland), 1874. Accordingly, where the holder of a spirit grocer's licence applying at the annual licensing sessions, for a certificate of the Justices for a renewal of such licence, omits to serve the full twenty-one days' notice of such application upon the police, as required by sect. 4 of the Beerhouses (Ireland), Act, 1864 (incorporated with the Licensing Act, 1872, by section 82

LICENSING ACTS—*continued.*
of the latter Act), the Justices, under sub-section 2 of section 12 of the Licensing Act (Ireland), 1874, may adjourn the application for the certificate for renewal to the next ordinary sessions for the purpose of having the notice served on the police, and if the notice be served on the police twenty-one days before the sessions to which the application is so adjourned, the Justices sitting at such latter sessions may hear and determine the application for the certificate. *The King* (*Robinson*) v. *Justices of Londonderry* - - K.B. 393

LIEN—Solicitors - - - - - - 118
See Solicitor's Lien.

LOCAL GOVERNMENT BOARD—Auditor—Surcharge notwithstanding taxation by officer of House of Commons - 535
See Witness.

—— Dairies, &c., Order 1908—Sanitary officer—Qualification—Registration as Veterinary Surgeon - - - - - - 56, 79
See Sanitary Officer.

—— Jurisdiction—Pension—Age of claimant
See Pension. 2. [88, 578

—— Powers and duties on appeals under Old Age Pension Act - - - - - 331
See Pension. 1.

—— Road—Surcharge—Burden of proof 573
See Road.

LOCAL PENSION COMMITTEE—Decision—"Final and conclusive" 88, 578
See Pension. 2.

—— Decision allowing pension — Appeal from—Notice - - - - - - 331
See Pension. 1.

MANDAMUS — *Practice — Civil proceedings on Crown side— Variation between writ and order—Amendment—Order XXVIII., Rr.* 6, 12; *Order LXXXIV., R.* 253.] Where the command in a writ of mandamus varies from that contained in the order allowing the issue of such writ, it is a matter of course to quash the writ so varying. There is no jurisdiction to amend a writ of mandamus that varies as aforesaid, unless the order giving leave to issue it is similarly amended either prior to or contemporaneously with the amendment of the writ. Where a mandamus commands several things, the prosecutor must show that he is entitled to enforce every one of such commands; and if he fails to establish a right to enforce any one of such commands, a peremptory mandamus cannot go. *The King* (*Jackson*) v. *County Council of County Cork* - - - - - K.B. 206

MANDAMUS—*continued.*
—— Estates Commissioners — Determination whether lands are fit to be considered an "estate"—Duty to hear owner 11
See Land Law (Ireland) Acts.

—— Order of Local Government Board—Whether *intra vires* - - - - - 56, 79
See Sanitary Officer.

MASTER AND SERVANT — *Hiring for particular service—Master whether parting with control of servant to hirer—Negligence causing injury to hirer's servant — Common employment.*] The Belfast Harbour Commissioners have under their statutory powers the control of the harbour and of all piers, docks, and quays belonging to it; and it is their duty to assign a berth to a vessel to be discharged in the port, they have power to provide cranes for the unloading of such vessels, and it is their duty to provide proper servants and labourers for working such cranes for the use of the public. The master of a vessel hired a crane from the Commissioners for the purpose of her discharge. He signed a request for its use, subject to the Commissioners' regulations, containing an agreement that he was to be responsible for all loss or damage arising from any improper use of the crane while so employed. The crane was put in position by the craneman, and the vessel was moved to a berth opposite it. The practice is that the buckets are filled by the hirer's servants, in the hold, one of whom directs the craneman to raise and lower each bucket, and to swing round the arm of the jib. The craneman regulates by a brake the speed of ascent and descent of each bucket, and he alone works the machine. While the plaintiff, being employed for that purpose by the ship-master, was filling a bucket in the hold, an empty bucket, while being lowered by the crane, descended with great speed and violence, and struck plaintiff, who was seriously injured. The craneman was employed and paid by the Commissioners, who alone could dismiss him. Except in directing buckets to be raised and lowered, neither the hirer nor his servants had any control over the craneman. If the ship-master was dissatisfied, his only remedy would be to direct the craneman to stop working, and to apply to the Commissioners to send another in his place, which they might or might not do. In no event could the hirer employ a servant of his own to work the crane, or procure a crane workable on the pier from anyone but the Commissioners. In an action by the plaintiff against the Commissioners to recover damages for personal injuries, the jury found that the hirer had no authority to control the craneman otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets;

MASTER AND SERVANT—*continued.*
that the bucket which injured the plaintiff got out of the control of the craneman, through his negligence; and that this negligence was the cause of the accident. *Held*, affirming the judgment of the Court of Appeal in Ireland, that the plaintiff was entitled to a verdict, and that the plaintiff and craneman were not at the time of the accident fellow-servants engaged in a common employment. *Donovan* v. *Laing, Wharton and Down Construction Syndicate* ([1893] 1 Q.B. 629) distinguished. *M'Cartan* v. *Belfast Harbour Commissioners* [H.L. 143

2. —— *Negligence of servant—Scope of employment—Servant having general authority to take out motor-cars belonging to his master.*] *I.*, who was the manager of the department for the sale of second-hand cars in the business of *F. & Co.*, a firm of motor engineers, while driving on a Saturday evening, at about 7 p.m., accompanied by two ladies, in a second-hand motor-car belonging to *F. & Co.*, ran over and killed *G. B.* In an action taken by *G. B.*'s widow against *F. & Co.*, under Lord Campbell's Act, for negligence of *I.*, evidence was given that *I.* frequently took out second-hand cars from the department of the business of which he was the manager without accounting to anyone for so doing, and that the petrol used by *I.* in so taking out these cars was charged to the second-hand department of the business. *I.* admitted that he took out the cars without accounting for so doing, and, in his evidence at the trial, stated that his being on the road gave him better opportunities for doing business for the firm; that on one or two occasions, of which that of the accident was not one, he had himself paid for the petrol he used in taking out the cars, but that upon the occasion of the accident he was driving solely for his own pleasure. The jury found that at the time of the accident *I.* was acting within the scope of his employment as the servant of *F. & Co. Held*, that there was evidence to justify the verdict of the jury, that *I.* was acting within the scope of his employment so as to render *F. & Co.* liable for his negligence. *Quære:* Whether, where a servant has a general authority to take out his master's vehicles, not only for the purposes of the master, but also for his own pleasure, it is to be inferred that every user of the vehicles under such general authority is a user by the servant as such within the scope of his employment? *Boyle* v. *Ferguson* - K. B. 489

—— Workman's Compensation Act.
See WORKMAN.

MISAPPROPRIATION—Ratification—Money had and received - - - 539
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See HUSBAND AND WIFE.

MOTION FOR JUDGMENT—Overholding—Weekly tenancy - - - 632
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See MASTER AND SERVANT. 2.

NEGLIGENCE—Master and servant—Master parting with control of servant while engaged on special service - 143
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—— Master and servant—Scope of employment—Servant entrusted with general authority to take out motor-cars - - 489
See MASTER AND SERVANT. 2.

—— Tramcar—Overcrowding—Special attraction—Necessary precautions - 224, 237
See TRAMWAY.

NEW TRIAL — *Practice* — "*Misdirection and non-direction*"—*Insufficient statement of grounds in notice of motion—Order XXXIX, Rule* 3.] A notice of motion for a new trial, grounded upon misdirection and non-direction of the Judge at the trial of the action, should state specifically the particulars as to misdirection and non-direction upon which the moving party intends to rely. *Pfeiffer* v. *Midland Railway Co.* (18 Q. B. D. 243) followed. *Hughes* v. *Dublin United Tramways Co.* - - - K. B. 114

NOTICE—Sub-lease—Particulars and conditions of sale - - - - 500, 517
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NOTICE TO QUIT—Weekly tenancy—Motion for judgment - - - - - 632
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—— 1908 (Feb. 17), Dairies, &c. - 56, 79
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—— 1908 (Oct. 15), Old Age Pensions, Rr. 18 (3), 19 (1) - - - - - - 331
See PENSION. 1.

OVERCROWDING—Tramcar—Negligence
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OVERHOLDING—Lease—7 Wm. 3, c. 8 (Ir.) ss. 1, 3 - - - - - 398, 419
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—— Weekly tenancy—Motion for judgment 632
See WEEKLY TENANCY.

PARLIAMENT — *County franchise* — 13 & 14 *Vict. c.* 69 (*Parliamentary Voters* (*Ireland*) *Act*, 1850), *s.* 2—£20 *freehold franchise.*] The £20 freehold franchise in counties has not been extinguished by the 13 & 14 Vict. c. 69, and still exists. *Coyle* v. *Barnhill* - - APP. 165

2. —— *Franchise*—£5 *freeholder*—*Joint-tenant*—*Vesting order of Land Commission*—*Purchase under Irish Land Acts*—*Local Registration of Title* (*Ireland*) *Act*, 1891—4 *Geo.* 4, *c.* 36, s. 1.] A vesting order made by the Land Commission to two persons jointly, and registered in their joint names under the Local Registration of Title (Ireland) Act, 1891, is not within section 1 of the 4 Geo. 4, c. 36, and the joint-tenant, if his share be of sufficient value, though under £20, is entitled to be registered as a voter in respect of the £5 freehold franchise. *M'Guinness* v. *Boyle* - - - - - APP. 170

3. —— *Franchise* — *Inhabitant householder* — *Payment of rates*—Bona fides—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3 (4) —*Urban District Council*—*Artizans' dwellings*—*Tenancy created by verbal agreement without resolution*—*Letting free of rates*—*Payment by Urban District Council*—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 52—*Landlord and Tenant.*] An Urban District Council, having acquired land within their district for the purpose, erected thereon artisans' dwellings. An agent of the council on their instructions, but without any formal resolution, let by verbal agreement one of the houses at the weekly rent of 3*s.* free of rates. In fixing the rent regard was had to the amount of rates the council would have to pay. The payment of rates by the council was not to be contingent on the receipt by them of the weekly rent. The Revising Barrister having found that all rates in respect of the premises had been paid by the council *bona fide* and in pursuance of the verbal agreement: *Held*, that the tenant of the premises, who was in occupation of them during the qualifying period, was entitled to the franchise. *Bryan* v. *Callaghan* (Lawson's Notes (1907), p. 241; 42 Ir. L. T. Rep. 97) approved of and followed. *Allen* v. *Carroll* - - APP. 190

4. —— *Power of Revision Court to amend* — Bona fide *mistake not tending to mislead*—*Qualifying premises inserted in list for polling district other than that in which they are situate*—48 *Vict. c.* 17, *s.* 27, *sub-s.* 1.] Where the name of a voter, otherwise duly qualified, appeared in the supplemental list of inhabitant householders for the registration unit of *A.*, polling district of *B.*, and the qualifying premises were situate in the same unit, polling district of *C.*, and the Revising Barrister, being satisfied that the error arose from a *bona fide* mistake, and that no person had been thereby misled or prejudiced, transferred the name from the list for *B.* to the list for *C.* Held, that he had power to make such amendment. *Gregg* v. *Kennedy* - - - - APP. 196

5. —— *Succession* — *Inhabitant householder* — *Occupation of portion of house*—*Subsequent occupation of entire house.*] *J.*'s name appeared on the list of voters as "inhabitant householder" of part of a house; *J.* had during portion of the qualifying period in fact occupied part of the house, a sub-tenant of *J.*'s occupying the remaining part; but on the determination of the sub-tenancy *J.* went into possession of and occupied the entire house during the remainder of the qualifying period. *Held*, by Holmes and Cherry, L.JJ. (Lord O'Brien, L.C.J., dissenting), that the claimant was entitled to a vote, and that it was unnecessary that the qualifying premises should have been set out in the list of voters as a house in succession from part to the whole of the premises. *Jackson* v. *Mahon*; *Stewart* v. *Mahon* - - APP. 318

—— Control of funds—University—Rating 593
See RATES. 3.

PARLIAMENT—*continued.*
—— Costs of opposing bill—Taxation by officer of House of Commons — Allowance of special fees to County Surveyor as expert witness—Auditor—Surcharge 535
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PARTICULARS OF SALE — Whether misleading - - - - 500, 517
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PASSENGER — Tramcar — Descent by front platform—Special attraction—Neglect of owners to take necessary precautions
See TRAMWAY. [224, 237

PAYMENT—Rates—*Bona fides* - - 190
See PARLIAMENT. 3.

PENSION—*Old age pension—Appeal from decision of local pension committee allowing pension—Notice of—Second application for pension* — Res judicata—*Powers and duties of Local Government Board on appeal*—8 *Edw.* 7, *c.* 40—*Statutory Regulations, Oct.* 15, 1908, *Rr.* 18 (3), 19 (1).] On an appeal to the Local Government Board by a pension officer from a decision of a local pension committee allowing a pension, it is sufficient that the claimant should have notice that an appeal has been brought; it is not necessary that notice should be given to him of the time and place of hearing. The Local Government Board have a discretion as to whether or not they shall hear in person the claimant and his witnesses. *Per* Madden, J. The claimant should be given an opportunity of presenting his case to the Local Government Board in some way suitable to the character of the inquiry, and it would probably be in writing. The question of how far the principle of *res judicata* applies to applications under the Old Age Pensions Act considered. *The King* (*Cairns*) v. *Local Government Board* - K.B. 331

2. —— *Old Age Pension—Decision of local pension committee—Statutory conditions—Jurisdiction—"Final and conclusive"—Old Age Pensions Act*, 1908, 8 *Edw.* 7, *c.* 40.] An applicant for an old age pension who had not, in fact, attained the age of seventy, was awarded a pension by the local pension committee, and no appeal against the award was brought in the manner prescribed by the Act. Subsequently new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a "question," in the manner provided by the Act, with reference to the pension, to the effect that the pensioner was not entitled to receive a pension, as she had not attained the age of seventy, and on the local pension committee deciding to continue the pension, the pension officer appealed to the Local Government Board in the manner prescribed by the Act, whereupon the Board deprived the pensioner of her pension. On the hearing of a petition of right brought by the pensioner—*Held*, that the original decision of the local pension committee was invalid, as the applicant had not fulfilled the statutory condition as to age, and that notwithstanding sect. 7 (2) of the Act, which enacts that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority . . . shall be final and conclusive," it was competent for the pension officer to raise the said question, and for the Local Government Board to deprive the pensioner of the pension on the ground of her age. ***Murphy*** v. *The King* - - - App. 88; H. L. 578

PEREMPTORY MANDAMUS.
See MANDAMUS.

PETTY SESSIONS CLERK — *Appointment of*—21 & 22 *Vict. c.* 100, *s.* 7—*Qualification of Justices taking part in*—"*Justices of such Petty Sessions*"—*Place of meeting.*] The appointment of Petty Sessions Clerk for a district is a ministerial and not a judicial act, and it is not necessary that it should be made in open Court. Any magistrate of the county residing within the Petty Sessions district is entitled to vote at the appointment, though he may never before have attended at Petty Sessions. *The King* (*Hade*) v. *Justices of Carlow* - - - - - K.B. 382

PLACE OF MEETING—Justices—Appointment of Petty Sessions Clerk - 382
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POLLING DISTRICT — Supplemental list—Misdescription—Amendment - 196
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POOR LAW—Rates.
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POST OFFICE—Service of writ on company—Registration — Delay caused thereby in delivery - - - - - 532
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PRACTICE—Alleged will—Administration notwithstanding—Motion - - 36
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—— *Certiorari*—Civil bill decree—Appeal pending - - - - - - - 54
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—— *Certiorari*—Refused on discretionary grounds
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—— Costs.
See COSTS.
—— Estates Commissioners—Originating application to have lands declared an "estate"—Duty to hear owner - - 11
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PRACTICE—*continued.*
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—— New trial—Notice of motion—Misdirection and non-direction - - - 114
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—— Remitting action to County Court - 469
See REMITTING ACTION TO COUNTY COURT.
—— Service of writ—Through post office—Delay from registration—Company - 532
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—— Service out of the jurisdiction — Colorable joinder of co-defendant — Order XI., R. 1 (*h*)—Abuse of rule of Court - 436 [442, 459
See SERVICE OUT OF THE JURISDICTION. 1, 2.
—— Solicitor's lien — Legal Practitioners Act, 1876—Charging order—Execution 118
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—— Taxation of Costs.
See TAXATION OF COSTS.

PRINTING — For county purposes — Expenses incurred by Clerk of the Peace 154, 474
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PUBLIC HEALTH ACT, 1878—Appointment of sanitary officer - - - 56, 79
See SANITARY OFFICER.
—— Contract with sanitary authority—"Value or amount" exceeding £50 - - 130
See SANITARY AUTHORITY.

PUBLIC-HOUSE — *Landlord and tenant — Yearly tenancy—Condition — Tied public-house — Agreement to continue exclusive dealing with assignees of reversion—Notice of such agreement to assignee of tenancy—Breach of agreement—"Good and sufficient cause for determination of tenancy"—Town Tenants Act*, 1906, *ss.* 5, 7.] *M.*, a brewer in the town of *S.*, let a public-house to *K.* as tenant from year to year, on the terms that *K.* would deal with *M.* exclusively for draught porter. The house, with the licence attached, was worth far more than the yearly rent, and, in fact, the only profit *M.* had out of it was the benefit of the agreement for exclusive dealing. *D. & Co.*, brewers in the town of *C.*, purchased *M.*'s reversion in the house, but did not acquire his brewery at *S.*, which was discontinued. *D. & Co.* entered into an arrangement with *K.* to continue the yearly tenancy "on the same conditions as *K.* had formerly held under *M.*" *K.* afterwards assigned the house to *O'L.*, and informed *O'L.* "of the arrangement to deal with *D. & Co.* for draught porter." *O'L.* did not take any draught porter from *D. & Co.*, but dealt with a rival firm, and *D. & Co.* evicted *O'L.* on notice to quit. *Held*, that the condition as to exclusive dealing with *D. & Co.* for draught porter was valid and binding on *O'L.*; and that the breach of it was good and sufficient cause under the Town Tenants Act for the determination of the tenancy, and that *O'L.* was therefore not entitled under the Act to compensation for disturbance. *O'Leary, Applicant*; *Deasy & Co., Respondents* K.B. 450; [APP. 455
—— License—Application by spirit grocer 312
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PUBLIC PURPOSES—Premises dedicated to or used for - - - 579, 593
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QUALIFICATION—Juror - - - 38
See JURY.
—— Justices — Appointment of Petty Sessions Clerk - - - - - 382
See PETTY SESSIONS CLERK.
—— Sanitary officer—Registration as Veterinary Surgeon - - - - 56, 79
See SANITARY OFFICER.

RATES — *Corporation of Dublin — Consolidated municipal rate — Right of appeal to Recorder — Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 269—*Rate made in pursuance of illegal resolution—Retrospective rate—Rate good on face*—Certiorari.] An appeal lies to the Recorder of Dublin in respect of the consolidated municipal rate struck by the Corporation of Dublin. Such appeal may be from the whole of the rate, in which case the whole rate may be quashed and a new rate ordered to be struck. A special meeting of the Dublin Corporation was summoned in December, 1909, on the requisition of seven ratepayers, to consider the question of unemployment in the city, and see what means could be adopted to alleviate same. The notice summoning the meeting stated that it was to consider the requisition which was set out in the notice. At the meeting a resolution was passed that the City Treasurer should be authorized to arrange with the Bank of Ireland for an overdraft of £10,000, and that of this sum there should be allocated to the Paving Committee £7000, Cleansing Committee £2000, and Estates and Finance Committee £1000. The sum of £10,000 was afterwards expended upon useful works. It was not necessary to obtain an overdraft from the bank. In preparing the estimate for the year ending the 31st March, 1911,

which was afterwards adopted by the Corporation, and upon which the consolidated municipal rate for that year was struck, this sum of £10,000 was taken into account. Upon an application for a writ of *certiorari* to quash the resolution and the rate:—*Held*, that the resolution was illegal and void on the grounds—(1) that the notice of the meeting was not sufficient to enable such a resolution to be passed, (2) that there was no power to borrow money for the purpose mentioned, and (3) that there was no power to apply the funds of the Corporation to the works contemplated by the resolution, being new works not taken into account in the estimate for the year ending 31st March, 1910. But *held* that in the circumstances, and having regard to the fact that an appeal would have lain to the Recorder against the rate, the writ of *certiorari* should be refused. *Quære*, does *certiorari* lie to quash a rate where it is good on its face and there is a right of appeal? *Quære*, if the rate had been quashed on *certiorari*, could a new rate have been struck for the year? *The King (Dublin Citizens' Association)* v. *Corporation of Dublin* - - - - - - K.B. 245

2. —— *Exemption—Hereditaments used exclusively for charitable purposes*—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2.] The appellants were trustees of a Temperance Hall, built, out of moneys raised by public subscription, with the object of promoting temperance among the poor and labouring classes of the town of Sligo and neighbouring districts, and for their moral and material advancement and improvement. There was no trust deed relating to the Hall. The Hall was used as follows: a person first coming to the Hall was expected to pay an entrance fee of 1*s.*, and every person using the Hall was expected to pay 2*d.* per week, and was "put on his honour" to pay these sums if he could afford to do so; but persons of the class the Hall was intended for were not obliged to pay these sums whether they could afford them or not. More than half of the persons using the Hall paid these fees. Men playing billiards or cards, or taking a bath, were expected to pay certain small sums, but not bound to pay them even if they could afford. Most persons playing billiards or cards, or taking baths, paid these sums. The sums received from the above sources were applied towards the upkeep of the Hall (which was not self-supporting), and in giving aid to persons who frequented it and were in temporary distress. There was a heavy building debt on the Hall, and to try and pay this off the trustees held occasional concerts and theatrical performances in the Hall, to which outsiders were admitted on payment for seats. The proceeds were applied in reducing the

building debt:—*Held*, that the original object was charitable; that an exclusively charitable user would not be affected by the incidental concerts and theatrical performances, nor by small payments made by persons directly within the charitable object; but that the substantial payments made for the use of the Hall by persons not within the charitable object, made the user not exclusively charitable, and the Hall, therefore, was not exempt from assessment for poor-rate. *Clancy* v. *Commissioner of Valuation* - - K. B. 173

3. —— *Exemption—Hereditaments and buildings used for public or exclusively charitable purposes—University College—Fees paid by students bound by charitable trust—Parliamentary control over funds*—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, s. 2.] University College, Cork, one of the constituent Colleges of the National University of Ireland, provided the highest class of education and instruction, and was open to all His Majesty's subjects; fees were charged to all students; these fees, however, were not payable to the professors, but were brought into the general funds of the College; the College was bound to present annual accounts of all receipts and expenditure to the Controller and Auditor-General, and these accounts, together with the report of the Controller and Auditor-General, had to be laid before Parliament. *Held*, that on these facts the hereditaments and buildings of the College were exempt under the Irish Rating and Valuation Code, on the ground that such hereditaments and buildings were (*per* Madden and Wright, JJ.) altogether of a public nature and used for public purposes; (*per* Kenny, J.) "exclusively charitable" in their objects, purposes, and user. *University College, Cork* v. *Commissioner of Valuation* - - K. B. 593

4. —— *Valuation — Premises "of a public nature" or "occupied for the public service," and premises "dedicated to or used for public purposes" —Premises marked "exempt" in valuation lists—Liability of person in receipt of rent therefor to pay poor rate on half such rent—Irish Poor Law Act*, 1838 (1 & 2 *Vict. c.* 56)—*Poor Law (Ireland) Act*, 1849 (12 & 13 *Vict. c.* 104)—*Irish Valuation Act*, 1852 (15 & 16 *Vict. c.* 63)—*Irish Valuation Amendment Act*, 1854 (17 *Vict. c.* 8)—*Estoppel.*] The decision of the Recorder of Dublin, upon an appeal under the Valuation Acts, 1852 and 1854, that certain hereditaments are used for "public purposes," is a judgment *in rem* as to the nature of the user of such hereditaments, and is "binding and conclusive on all parties to all intents and purposes whatsoever"; and therefore the person in receipt of the rent in respect of such hereditaments is liable, under section 10 of the Poor Law (Ireland) Act, 1849, "to be rated in respect of

RATES—*continued.*
such rent to the extent of one-half the poundage" of the rate made for the relief of the poor, and such person is estopped by such judgment *in rem* as aforesaid from denying that the hereditaments therein referred to are used for public purposes. The class of hereditaments exempted by 17 Vict. c. 8, s. 2, as being "of a public nature," or "occupied for the public service," is co-extensive with that described in 1 & 2 Vict. c. 56, s. 63, as being "dedicated to or used for public purposes." *Moylan* v. *Dublin Port and Docks Board* (Ir. R. 9 C. L. 457) followed. *Moore* v. *Boyd* - K. B. 579

—— *Bona fide* payment of—Franchise - 190
See PARLIAMENT. 3.

—— Qualification as juror - - - - 38
See JURY.

RATIFICATION—Misappropriation of money
See HUSBAND AND WIFE. [539

RECESSION—Of sea—Accretion to foreshore—Gradualness - - - - - 260
See FORESHORE.

REMITTING ACTION TO COUNTY COURT — *Practice — Slander and libel — Grave misconduct in course of employment imputed — Persistence in repetition of charge.*] An action having been brought for slander and libel imputing to the plaintiff dishonesty in the course of his employment, it appeared on a motion by the defendant to remit the action for trial to the County Court that the plaintiff, who was admittedly without visible means, was a carter in the employment of a coal merchant, and was employed to deliver a ton of coal to the defendant. According to the plaintiff's affidavit the defendant accused him in the presence of two servants of attempting to rob her, by keeping back three bags. She unquestionably telephoned to his employer to this effect, in consequence of which the coal was weighed and found to be only a trifle under the ton, which might be accounted for by taking a bucketful for use between the delivery and the re-weighing. The defendant, however, wrote to the employer and the plaintiff's solicitor, persisting in the charge. On the motion to remit, the defendant disclaimed any intention to plead justification, denied that she charged the plaintiff in the presence of servants with dishonesty, and relied on privilege as to the communications to the employer and solicitor. There were no grounds for attributing any personal malice or doubting the *bona fide* belief of the defendant, though erroneously formed, that the delivery was short by three bags. *Held*, by the Lord Chancellor and Holmes, L.J., having regard to previous decisions of the Court of Appeal,

REMITTING ACTION TO COUNTY COURT—*continued.*
that the case ought not to be remitted. *Diss.* Cherry, L.J. *Per* Cherry, L.J. No general principle can be laid down as to whether a case ought or ought not to be remitted beyond the statutable test of fitness to be prosecuted in the Superior Court. *Foran* v. *Roche* - APP. 469

RENEWAL OF CERTIFICATE—Licence—Notice to police — Annual Licensing Sessions - - - - - 393
See LICENSING ACTS. 2.

RESIDENCE—Within same civil bill jurisdiction—Duty of Taxing Master to determine - - - - - - 109
See TAXATION OF COSTS. 1.

RES JUDICATA — Second application for pension - - - - - 331
See PENSION. 1.

RESOLUTION — Of corporation — Illegality — Rate struck in pursuance of - 245
See RATES. 1.

ROAD—*Local Government*—"*Public Roads*"—*Evidence—Surcharge*—61 & 62 *Vict. c.* 37, *sect.* 82; 7 & 8 *Vict. c.* 106, *sect.* 55.] Where there is no evidence of public user or of any presentment having ever been made in respect of a road, and where there is clear evidence of non-user in modern times, such road is not a "public road," the expense of repairing and maintaining which a County Council can lawfully provide for and charge upon the rates as a public work. The onus of showing statutable authority for payments made by a public body lies on the body making such payments. *The King* (*O'Neill and others*) v. *Newell* - - - - - - K. B. 573

SALE OF LAND.
See VENDOR AND PURCHASER.

SANITARY AUTHORITY—*Contract made by —"Value or amount" exceeding £50—Seal—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict, c.* 52)—*Ascertainment of value or amount recoverable by contractor on completion — Contract enabling a sanitary authority to terminate contract at pleasure.*] The Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), sect. 201, sub-sect. 1, enacts that "every contract made by a sanitary authority whereof the value or amount exceeds £50 shall be in writing, and sealed with the common seal of such authority." The "value or amount" of a contract within the meaning of the enactment is the amount which, in the light of the facts within the contemplation of the parties, and in reference to which the contract is made, would be recoverable by the contractor from the sanitary authority on completion. In an action by a contractor

SANITARY AUTHORITY—*continued.*
against a sanitary authority to recover the price of boring four Artesian wells, under separate contracts not reduced to writing, the terms of the contracts contained in correspondence between the parties and resolutions of the authority were, that the plaintiff should proceed with the boring until (*a*) he met with unforeseen difficulties, (*b*) or sufficient water were obtained, (*c*) or a reasonable time had elapsed, (*d*) or the work was countermanded by the defendants. The minimum rates to be charged per day for boring, taken in conjunction with the length of time which the parties expected to elapse before water was found, showed that when the contracts were made, the parties contemplated that the cost of the boring in each case would exceed £50. *Held*, that sect. 201, sub-sect. 1, of the Public Health (Ireland) Act applied, and that, as the contracts were not sealed, the plaintiffs could not recover, and that the defendants' right to terminate the work at pleasure did not prevent the application of the Act and section. *Munro* v. *Mallow Urban District Council* - K.B. 130

SANITARY OFFICER — *Local Government Board—Powers of—Dairies, Cowsheds, and Milkshops Order*, 1908—*Public Health Act*, 1878 (41 & 42 *Vict. c.* 62), *s.* 11 — *Contagious Diseases* (*Animals*) *Act*, 1878, 1886 (41 & 42 *Vict. c.* 74, *s.* 34; 49 & 50 *Vict. c.* 32, *s.* 9)—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57)—*Sanitary laws—Inspector—Qualification.*] By s. 9 (1) of the Contagious Diseases (Animals) Act, 1886, the powers vested in the Privy Council of making orders under section 34 of the Contagious Diseases (Animals) Act, 1878, were transferred to the Local Government Board, including, *inter alia*, orders for the registration of persons carrying on the trade of cowkeepers, dairymen, or purveyors of milk; for inspection of cattle in dairies; for regulating the lighting, ventilation, cleansing, drainage, and water-supply of dairies and cowsheds; for securing the cleanliness of milk-stores, milkshops, and milk-vessels, containing milk for sale; and for prescribing precautions to be taken for protecting milk against infection or contamination. By the Diseases of Animals Act, 1894, schedule 5, the whole of the Act of 1878, except sect. 34, and the whole of the Act of 1886, except sect. 9, are repealed. Section 69 of that Act provided that the provisions thereof (sect. 35) requiring local authorities to keep appointed veterinary inspectors should not extend to Ireland, and by section 67 the local authorities in Ireland are the boards of guardians of the several poor law unions; this being a re-enactment of the repealed section 81 of the 41 & 42 Vict. c. 74. On the 17th February, 1908, the Local Government Board, acting under section 34 of the Act of 1878, made an Order

SANITARY OFFICER—*continued.*
entitled "the Dairies, Cowsheds, and Milkshops (Ireland) Order, 1898," for the purposes of that section, and, *inter alia* (Art. 25), provided that the local authorities should, with the approval of the Board, appoint so many inspectors or other officers as might be necessary for the execution and enforcement of the Order, and pay them such salaries as the Board should approve of. Section 11 of the Public Health Act, 1878, requires every sanitary authority to appoint such sanitary officers as the Local Government Board should in each case direct, with such salaries as the sanitary authority, with the approval of the Board, should determine, and that the Board should assign to such officers their respective duties and functions in "the discovery, or inspection, or removal of nuisances, in the supply of pure water, in the making or repairing of sewers and drains, or in generally aiding the administration of the sanitary laws within the district. The Kilmallock Rural District Council declined to put in force in their district the Dairies, Cowsheds, and Milkshops Order, 1908, and the Local Government Board issued a sealed order purporting to be made under section 11 of the Public Health Act, 1878, requiring them, as sanitary authority of the Kilmallock Rural District, to appoint a person registered under the Veterinary Surgeons Act, 1881, to be a sanitary officer of the said district, with such duties and functions in aiding the administration of sanitary laws as the Board should assign to him, and with such salary as the Rural District Council should determine, with the Board's approval. The Kilmallock Rural District Council having failed to comply with this order—*Held*, by the Court of Appeal, reversing the order of the King's Bench Division, that the sealed order was *intra vires*, and that the Local Government Board were entitled to enforce the same by mandamus. *Held*, also, by the Lord Chancellor and Holmes, L.J., that the Dairies, Milkshops, and Cowsheds Order, 1908, was *intra vires*. *The King* (*Local Government Board*) v. *Kilmallock Rural District Council* [K.B. 56; App. 79

SCOPE OF EMPLOYMENT — General authority given to servant to use motor cars - - - - - - 489
See Master and Servant. 2.

SEA—Gradual recession - - - - 260
See Foreshore.

SEAL — Contract with Sanitary Authority — "Value or amount" exceeding £50
See Sanitary Authority. [130

SERVANT
See Master and Servant.

SERVICE—*Writ of summons—Practice—Prematurely marking judgment—Service of writ by posting—Companies (Consolidation) Act*, 1908 (8 *Edw. 7. c.* 69), *sect.* 116—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *sect.* 26.] Plaintiffs, who could lawfully have effected service of a writ against a defendant company by posting the same in a prepaid cover properly addressed, for greater certainty registered the same: in consequence of such registration the letter was not in fact delivered until the day following the "ordinary course of post." The plaintiffs *bona fide* believed that the letter had been delivered in the ordinary course of post, and, acting on such belief, marked judgment in default of appearance immediately after the expiration of the period allowed for entering an appearance. *Held*, on motion by the defendant company to set aside such judgment, that, notwithstanding section 26 of the Interpretation Act, 1889, where the writ had not, in fact, been delivered in the ordinary course of post, the defendants were entitled to have the judgment set aside on the ground that it had been marked prematurely. *Ryland's Glass Engineering Co.* v. *Phœnix Co.* - - - - - K. B. 532

—— Summons—Summary jurisdiction—Last or more usual place of abode - - 258
See JUSTICES.

SERVICE OUT OF THE JURISDICTION—*Practice—Concurrent writ for service out of jurisdiction—Order XI, R.* 1 (*h*)—*Action properly brought against person within jurisdiction — Colourable joinder of parties—Abuse of rule of court—Discontinuance of action against the only defendant within the jurisdiction—Stay of proceedings against the remaining defendant—Judicature Act (Ireland)*, 1877 (*40 & 41 Vict. c.* 57), *sect.* 27, *sub-sect.* (5)—*Unconditional appearance.*] To justify the exercise of the power to allow service of a writ out of the jurisdiction under Order XI, R. 1 (*h*), the person served within the jurisdiction must be one against whom relief is *bona fide* sought by the plaintiff and not a person, colourably joined for the purpose of effecting service out of the jurisdiction under the Order, against whom the plaintiff has no real cause of action, and against whom the action is discontinued before trial. In a case of colourable joinder, even though an unconditional appearance had been entered by defendant out of the jurisdiction, the Court, upon discontinuance of the action against the sole defendant within the jurisdiction, stayed all further proceedings in the action on the ground that it was an abuse of the rule. *Sharples* v. *Eason & Son and Wilkinson*
[K. B. 436; APP. 442

2. —— *Practice—Libel—Publication—Necessary or proper party to action properly brought against defendant within the jurisdiction—Order XI, R.* 1 (*h*).] **SERVICE OUT OF THE JURISDICTION** —*continued.*
A letter, alleged to be a libel on the plaintiff, was published by a London newspaper, copies of which were sold in Dublin by Eason & Son, a firm of Dublin newsagents, between whom and the publishers of the paper no contract of agency existed, and who were, as they alleged, ignorant of the alleged libel. Proceedings for the alleged libel were threatened by the plaintiff against the publishers and printers of the paper in London, and on their refusal to nominate a solicitor in Ireland to accept service of a writ of summons on their behalf, the plaintiff, without any previous communication, issued a writ of summons claiming damages for the alleged libel against Eason & Son, and then applied for and obtained an order under Order XI, R. 1 (*h*), granting leave to issue and serve a concurrent writ for service out of the jurisdiction on the publishers and printers of the paper in London, alleging that the latter were necessary and proper parties to the action brought against Eason & Son, within the jurisdiction. *Held*, by the Court of Appeal (affirming the decision of the King's Bench Division), that the order for service out of the jurisdiction should be set aside, on the ground that the action against Eason & Son was only instituted for the purpose of bringing the English defendants within the jurisdiction of the Irish Courts. *Ross* v. *Eason & Son and others*
[APP. 459

SESSIONS — Interpleader — Civil bill — When returnable - - - - - 633
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SET-OFF—Not allowed to prejudice solicitor's lien—40 & 41 Vict. c. 56, s. 2 118
See SOLICITOR'S LIEN.

SHIP—Charter party—Strike clause—Demurrage
See CHARTER PARTY. [348

SOLICITOR'S LIEN — *Charging order — Property recovered or preserved—Judgment for costs—Cross-judgments — Set-off — Legal Practitioners (Ireland) Act*, 1876 (39 & 40 *Vict. c.* 44), *s.* 3—40 & 41 *Vict. c.* 56, *s.* 62—*R. S. C. Order LXV, Rule* 18.] The defendant having obtained in this action judgment with costs against the plaintiff, and the plaintiff having subsequently recovered judgment with costs in an action for rent against the defendant, on which execution was issued, and a return of *nulla bona* made, the defendant's solicitor, who had obtained for the defendant the said judgment with costs, applied for a charging order on such costs under 39 & 40 Vict. c. 44. *Held* — (1) That such costs were "property recovered" within the statute in respect of which an order of charge could be made; (2) that a set-off in respect of the costs of the plaintiff's

SOLICITOR'S LIEN—*continued.*
judgment to the prejudice of the solicitor's lien should not be allowed; (3) that the statute 40 & 41 Vict. c. 56, sect. 62, created no right of set-off, and did not affect the solicitor's right to a charging order. *Quære* the effect of the proviso in that section. Nature of lien and the effect of the above statutes discussed. *Johnston* v. *M'Kenzie* [K. B. 118

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7 Wm. 3 (Ir.), c. 8—Death of persons beyond the sea, ss. 1, 3 - - - 398, 419
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SURVEYOR — County — Special fee as expert witness — Opposition to Bill in Parliament - - - - - 535
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TAXATION OF COSTS—*Plaintiff and defendant within same civil bill jurisdiction—Judgment for less than £20 "with costs"—Duty of Taxing-Master to determine question of residence.*] Plaintiff, in an action of contract, set forth in his writ that the defendant resided in London, and applied for and obtained an order to serve the writ upon the latter out of the jurisdiction. Upon such service the defendant, by his solicitor, entered an appearance, without prejudice to a notice of motion to remit. At the trial the plaintiff obtained a verdict for £18 7*s.* 6*d.*, and judgment was accordingly entered for him for that amount with costs. Upon the taxation of costs the defendant submitted that the order only gave to the plaintiff such costs, if any, as he was by law entitled to, and tendered to the Taxing-Master an affidavit for the purpose of showing that the defendant had a residence within the same civil bill jurisdiction, and that therefore the plaintiff was not entitled to any costs. The Taxing-Master refusing to receive such affidavit

TAXATION OF COSTS—*continued.*
or to consider the question of residence, on the ground that he was bound by the terms of the judgment to tax and give to the plaintiff half the costs. *Held*, that such judgment with costs only entitled the plaintiff to such costs as were legally recoverable by him under the General Orders. That where the amount of such costs, if any, depends on the fact of residence, this fact, which is not in issue at the trial, should be determined on affidavit by the Taxing-Master, with a right of appeal to the King's Bench Division. *Reynolds* v. *Enfield Cycle Co.* (3 N. I. J. R. 205) followed. *Keating* v. *Storey* - - - - - K.B. 109

2. —— *Proceedings in King's Bench (Bankruptcy)—Higher scale—Instructions for brief—Charge and discharge—"Action"—Supreme Court of Judicature (Ireland) Act*, 1877, *sect.* 3—*R. S. C. (Ir.)*, 1905, *Order LXXXVIII., Rr.* 57–64; *App. S., Part I.*, 74, 75, *Part V.*, 97.] For the purposes of taxation of costs, even when directed to be paid on the higher scale, proceedings in the King's Bench (Bankruptcy) by charge and discharge do not come within the definition of "action" in the 3rd section of the Judicature (Ireland) Act, 1877. *In re Clancarty* APP. 199

—— by officer of House of Commons—Surcharge by Local Government Board Auditor
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TENANT PURCHASER — Qualification as juror—"Clear income" - - 38
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TORT—Fraud by married woman—Ratification by party affected—Liability of husband
See HUSBAND AND WIFE. [539

TOWN TENANTS ACT, 1906—Breach of condition of tenancy—Tied public-house
See PUBLIC-HOUSE. [450, 455

TRAMWAY—*Injury to passenger—Overcrowding—Service for special attraction—Descent by front platform—Precautions to be taken by owners of tramcar—Evidence of negligence.*] On the occasion of an International football match to be played in a well-known ground in the suburbs of Belfast the plaintiff boarded a tram car of the defendants labelled "Linfield" (the football ground) "or Windsor Avenue." When plaintiff took his seat in the front of the roof, there was no lack of accommodation, but as the car proceeded on its way passengers continually collected until every space was filled and the car became overcrowded. On reaching a stopping-place within a short distance of Windsor Avenue some passengers alighted, descending by the front steps to the motor-man's platform, the collapsible gate by which it was guarded being then opened, and the step to the

TRAMWAY—*continued.*
road being let down. As the car was approaching Windsor Avenue, which is the usual stopping-place for the Linfield grounds, plaintiff rose from his seat, descended by the front steps and told the motor-man he wanted to get off. The gate was open, step let down, and the car slowed as if to stop. Just then an Inspector of the defendants called on the motor-man to go on, which he did, and the pressure of the descending crowd behind plaintiff threw him off the car and he was severely hurt. At the trial the defendants, at the close of the plaintiff's case, asked for a direction and did not offer any evidence or suggest any question to be left to the jury. In answer to the questions left to them the jury found that the defendants should have expected that at Windsor Avenue, having regard to the overcrowding, passengers would leave the car hurriedly by the front platform; that they did not take proper precautions to prevent injury to any passengers so proceeding; and that it was by reason solely of failure to take such precautions that the injuries to plaintiff occurred, it having been explained to the jury by the Judge that they should not find the last point in favour of the plaintiff if there was contributory negligence on his part. *Held*, that the circumstances justified the verdict, and that the plaintiff was entitled to judgment thereon. *Pickering* v. *Belfast Corporation* - - - - - K.B. 224; App. 237

ULTRA VIRES—Order of Local Government Board - - - - - - 56, 79
See Sanitary Officer.

UNIVERSITY — Buildings — Exemption from rates - - - - - - 593
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USER—As betting-house - - - 216
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—— As public road - - - - - 573
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VENDOR AND PURCHASER — *Particulars of sale, whether misleading—Sub-lease—Notice of.*] The advertisement of an intended sale of a public-house described it as in the occupation of a tenant at a yearly rent, but did not specify the tenure by which the tenant held. An intending purchaser having seen the advertisement made an offer which was accepted, subject to conditions of sale, an agreement incorporating which she signed, and which stated explicitly that the tenant of the publichouse held under a lease which had ten years to run. There was a conflict of evidence as to whether the intending purchaser understood before signing the agreement that this lease was outstanding, and she sought to repudiate the purchase on the ground that she was misled by the advertisement into supposing that there was a yearly

VENDOR AND PURCHASER—*continued.*
tenant in occupation of the publichouse. In an action by the plaintiff for the deposit, fraud was not pleaded or alleged, but the jury found in answer to questions put to them that the purchaser was misled by the advertisement, and did not understand when signing the agreement that there was the lease of the publichouse outstanding. *Held*, by the King's Bench Division and the Court of Appeal, that there was no question for the jury, and that a verdict should have been directed for the plaintiff; that the advertisement was not misleading; and that, applying the principle of *Carroll* v. *Keayes* (I. R. 8 Eq. 97), it was sufficient to put the purchaser on inquiry as to the tenure under which the occupier held: and that in the absence of fraud she was bound by the agreement which she signed specifying the actual tenure:—*Semble*, there is no conflict in principle between *Carroll* v. *Keayes* and *Caballero* v. *Henty* (L. R. 9 Ch. App. 447); but even if there were, *Carroll* v. *Keayes* must be considered an authority binding in this country. *Clements* v. *Conroy* K. B. 500; App. 517

VESTING ORDER—£5 freehold franchise — 4 Geo. 4, c. 36, s. 1 - - - 170
See Parliament. 2.

VETERINARY SURGEON—Sanitary officer —Local Government Board Order 56, 79
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VOLUNTARY CONVEYANCE — *Whether fraud on creditors—Existing creditors paid off — Future creditor*—10 *Car.* 1 (*Ir.*) *sess.* 2, *c.* 3.] In the absence of any express intention to defraud, a voluntary deed will not be set aside at the instance of a creditor whose debt comes into existence after its date, if all creditors existing at the date of the deed have been paid off. *In re Kelleher* - App. 1

WEEKLY TENANCY— *Practice — Action to recover possession of land—Overholding — Notice to quit—Motion for final judgment—Specially indorsed writ—Orders III, Rule* 6, *and XIV. R.* 1.] Motion for final judgment granted on a specially indorsed writ to recover possession of premises held under a weekly tenancy which had been determined by notice to quit. *M'Gillicuddy* v. *Cassidy* [App. 632

WELL—Contract to sink—Sanitary authority 130
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WILL — Alleged —Administration notwithstanding—Condemnation on motion - 36
See Administration, Grant of.

WINDING UP—Building Society—Jurisdiction of County Court - - - 553
See Building Society.

WITNESS — *Local Government — Surcharges—Powers of auditor—Special payments by County Council to their county surveyor for acting as an expert witness on their behalf — Borough Funds (Ireland) Act*, 1888 (51 & 52 *Vict. c.* 53), *ss.* 8, 10; *Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *sect.* 17]. Notwithstanding the provisions in section 8 of the Borough Funds (Ireland) Act, 1888, where an auditor of the Local Government Board disallows and surcharges a payment made by a County Council in pursuance of a bill of costs taxed by a taxing officer of the House of Commons, the King's Bench Division has power to review such disallowances and surcharges upon *certiorari*. Where a County Surveyor attends the House of Commons by direction of and on behalf of his County Council to give assistance as an expert witness in opposing a bill before Parliament, such attendance as an expert is not within his ordinary duties, and he is entitled to a special fee therefor in addition to his ordinary salary. *The King (O'Neill and others)* v. *Newell* - APP. 535

WORDS—"Action"—Judicature Act, 1877, s. 3. *See* TAXATION OF COSTS. 2. [199

—— "Clear income"—38 & 39 Vict. c. 21, s. 2. *See* JURY. [38

—— "County purposes"—6 & 7 Wm. 4, c. 116, s. 142 - - - - - 154, 474 *See* CLERK OF THE PEACE.

—— "Elsewhere absent themselves within this realm"—7 Wm. 3 (Ir.), s. 1 - 398, 419 *See* LEASE.

—— "Final and conclusive"—8 Edw. 7, c. 40, s. 7 (2) - - - - - 88, 578 *See* PENSION. 2.

—— "Last or more usual place of abode"—14 & 15 Vict. c. 93, s. 12 (3) - - 258 *See* JUSTICES.

—— "Property recovered"—39 & 40 Vict. c. 44, s. 3 - - - - - - 118 *See* SOLICITOR'S LIEN.

WORDS—*continued.*

—— "Value or amount exceeding £50"—41 & 42 Vict. c. 52, s. 201 - - - 130 *See* SANITARY AUTHORITY.

—— "Workmen essential to discharge of cargo"—Charter party - - - 348 *See* CHARTER PARTY.

WORKMAN — *Workmen's Compensation Act*, 1906—*Accident arising out of, and in the course of, employment—Evidence—Hearsay—Statements made by deceased as to injuries—Return from work bearing physical marks consistent with alleged accident.*] A workman in the employment of an undertaker and funeral contractor had in the course of his ordinary duty to lift coffins in and out of vans. One morning he went out to his work without any marks of physical injury, and he returned suffering from hurts to his chest, side, and leg, the marks of which were visible, and seen by his wife and medical attendant. They were caused by abrasions as if something had knocked against him. He told the doctor that they were the result of an accident, and the doctor stated to the employer that the injured man said that he met with an accident by the moving of a coffin, that he was very bad, and would probably die of his injuries. The employer's reply (according to the doctor's evidence) was merely that he was insured. The injured man died of pneumonia, supervening on traumatic pleurisy caused by these hurts, and the Recorder of Dublin having so found, and also found that the accident arose out of, and in the course of, the employment:—*Held*, by the Court of Appeal, that the statements of the deceased workman were properly admitted in evidence; and, following *Mitchell* v. *Glamorgan Coal Co.* (23 Times L. R. 588), that there was sufficient evidence to justify the findings of the Recorder. *Wright, Applicant; Kerrigan, Respondant* [APP. 301

—— Essential for discharge of ship's cargo—Strike - - - - - - 348 *See* CHARTER PARTY.

THE END.

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